IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1782

LAWRENCE E. BOWLING,
Petitioner,

v.

DAVID MATHEWS et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ABBREVIATIONS USED IN THIS PETITION

A = Appendix to the petition.
Bd. Ex. = Exhibit attached to Findings, Conclusions and Decision of the Board of Trustees, designated in the Record in Bowling v. Mathews, Appeal No. 75-3879, as Doc.3(H)8, filed in the District Court on April 14, 1976.
Doc. = document, as numbered in Record certified to the Court of Appeals.
PX = Petitioner's (University's) exhibits in Record.
RX = Respondent's (Bowling's) exhibits in Record.
M = Record in Bowling v. Mathews, Appeal No.75-2949.
2M = Record in Bowling v. Mathews, Appeal No.76-3879.
2M Doc.3(G)7 = Transcript of Proceedings Before the Board of Trustees, December 13, 1975, filed in District Court, April 14, 1976.
2M Doc.3(H)8 = Findings, Conclusions and Decision of the Board of Trustees, filed in District Court, April 14, 1976.
S = Record in Bowling v. Scott, Appeal No. 75-1426, in which only the documents were numbered consecutively, as certified on appeal.
1T = Transcript of the First Hearing.
2T = Transcript of the Second Hearing.

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Petitioner Lawrence E. Bowling respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, affirming a summary judgment and other orders of the United States District Court for the Northern District of Alabama, in Bowling v. Mathews and Bowling v. Scott, which were consolidated on appeal.[1]

[1]Respondents are the following individually and officially charged officers of the University of Alabama: David Mathews, President; Richard Thigpen, past Executive Vice President; Paul E. Skidmore, General Counsel; Howard B. Gundy, past Academic Vice President; Floyd H. Mann, Special Assistant to the President; Willard Gray, past Associate Academic Vice President; Douglas E. Jones, Dean, College of Arts and Sciences; James B. McMillan, past Chairman, Department of English; Dwight L. Eddins, past Chairman, Department of English; First Hearing Committee Members Annabel D. Hagood, Robert E. Johnson, John S. Pancake, and C. Dallas Sands; present and past Members of the Board of Trustees George C. Wallace, LeRoy Brown; Daniel T. McCall, Jr.; Winton M. Blount; Eris F. Paul; Yetta G. Samford, Jr.; John T. Oliver, Jr.; John A. Caddell; Ehney A. Camp, Jr.; Samuel Earle G. Hobbs; Thomas S. Lawson; and Ernest G. Williams; and J. Rufus Bealle, Executive Secretary to the Board of Trustees.

OPINIONS BELOW

The opinion of the Court of Appeals dated January 8, 1979, and reported at 587 F. 2d 229, is reprinted at A1. The opinion of the Court of Appeals dated April 14, 1974, and reported at 511 F.2d 112, is reprinted at A6. Orders of the District Court are attached as follows: Order of February 1, 1974, remanding the cause to the University, A8; Orders of June 20, 1974, and January 28, 1975, denying reinstatement and declaratory judgment, A9-12; Order of May 22, 1975, granting final dismissal as to defendant Sands, A13; Order of August 18, 1976, granting summary judgment to the remaining defendants, A14.

JURISDICTION

The first judgment of the Court of Appeals was entered on April 14, 1975. A16. The last judgments of the Court of Appeals were entered on January 8, 1979. A17-18. Time for filing a petition for rehearing en banc was extended to February 21, 1979. A timely petition for rehearing en banc was denied on March 13, 1979. A19. The jurisdiction of this court is invoked under 28 U.S.C. § 1454(1).

QUESTIONS PRESENTED

1. Whether, in an action by a discharged tenured professor suing named state officials for equitable relief and damages for deprivation of rights protected by the Fourteenth Amendment and 42 U.S.C. §§ 1983, 1985, and 1986, including First Amendment rights and voting rights, a District Court may deny plaintiff's right to a plenary trial, including discovery and trial by jury, remand the cause to defendants for a second discharge proceeding, and, on the basis of that hearing record, grant summary judgment for defendants on both the equitable and the legal issues.

2. Whether a tenured teacher, found by the Court to have been discharged without due process, is entitled to reinstatement prior to another discharge proceeding.

3. Whether a termination policy providing for discharge of tenured teachers for undefined and unrestricted "adequate cause" is unconstitutionally vague and overbroad.

4. Whether dismissal charges referring to periods of one to seven years prior to last year of employment and alleging conduct for which there had been no warning deny due process, as held by the Supreme Court of Alabama.

5. Whether defendants charged with conspiracy and deprivation of civil rights may be dismissed prior to answer, discovery, or evidentiary hearing, on a plea of quasi-judicial immunity in non-judicial action.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

U.S Constitution, Article I, §§ 9 and 10;

U.S. Constitution, Amendments I, VII, and XIV;

U.S. Code, Title 42, Sections 1983, 1985(3), and 1986;

University of Alabama, Policy on Termination of Appointment, Faculty Handbook, 1968, p. 38.

The texts are set forth in Appendix L, infra at A20-23.

STATEMENT OF THE CASE

This case arises because certain officers of the University of Alabama (1) solicited a tenured senior full professor, Dr. Lawrence E. Bowling, for a political contribution in a presidential election, (2) discriminated against him in salary increments and course assignments because of his refusal to contribute, (3) discharged him without any charges or opportunity for hearing, because of his complaints concerning the solicitation, discriminations, and conditions of his employment, and (3) after reinstating him following his declaration of intent to file court action, permanently suspended him from all his professional duties, without any prior notice, charges, or opportunity for a hearing, and (4) thereafter discharged him pursuant to a hearing which the District Court found to have denied due process. The original complaint demanded reinstatement, back pay, and compensatory and punitive damages in excess of $10,000 against individually and officially named

defendants charged with violating rights protected by the First, Ninth, and Fourteenth Amendments and by 42 U.S.C. §§ 1983, 1985(3), and 1986. Trial by jury was timely demanded. The District Court's jurisdiction rested on 28 U.S.C. §§ 1331 and 1343.

Specifically, in October, 1964, English Department Chairman James B. McMillan served on petitioner, at his campus post of duty and during working hours, a solicitation for a political contribution to support the "election of President Johnson and Senator Humphrey" in the presidential election. M53 (See abbreviations, p. ii, supra.) Petitioner refused to contribute, and McMillan thereafter began and continued a course of discrimination against him in the assignment of classes and salary increments. In the spring of 1967, petitioner brought these discriminations to the attention of the President and the Vice Presidents and also called attention to the fact that, because of McMillan's ineffective leadership of the department, relatively few students were enrolling in English. M4,156, 177, 193. He requested, but never received, a grievance hearing on these issues. Instead, without any prior notice, charges, or hearing, he was ordered to submit to a psychiatric examination or be discharged. M 178, 195-200. He requested a statement of charges; the request was denied; he refused to submit to the examination and was informed that his employment would be terminated as of July 1, 1967.

Petitioner sought the services of an internationally recognized psychiatrist, who advised him: "What you need is not a psychiatrist but a lawyer. ... Go back to your university and tell those officials ... that you'll see them in court." Petitioner did as advised, and the President immediately reinstated him in his position on August 18, 1967. M180; 2T 1265-1269, 1896-1897, PX 51. But unknown to petitioner, "there were discussions about whether Professor Bowling should have any further salary increases or any more leaves of absence". 2T RX 1-A at 313. Plaintiff received no salary increase for 1967-68, the academic year following this matter, and no salary increase after 1970. M180, ¶ 15X.

In the fall of 1971, petitioner began researching an article on "High Athletics and Low Academics at the University of Alabama". Its point was that, by strict discipline in football, the school had won the rating of Number One; whereas, in academics, the University Administration's general attitude of permissiveness had resulted in low ratings in many regional and national surveys and reports. M5,157. On September 13, 1971, petitioner interviewed University Counsel George Driver concerning these matters. Id. Immediately thereafter, on the same day, Chairman McMillan and Dean Douglas E. Jones began harassing petitioner concerning a report on his leave for the previous academic year. 2T 964[A]-167; PX 19-A, 18-A. Petitioner also brought these matters to the attention of two members of the Board of Trustees, on September 25, 27. M157, ¶17E.

On January 1, 1972, McMillan was replaced as Chairman by Associate Professor Dwight L. Eddins, who, on January 11, "requested" that petitioner teach a section of English 9, an elementary course normally taught by part-time graduate assistants. PX 15. Petitioner stated that teaching this course would violate the terms of his employment but that he would teach it if ordered to do so. 2T 692, Eddins's testimony. On Janu-

ary 12, Law Professor C. Dallas Sands advised Dean Jones concerning discharge proceedings in this case; and on January 13, Jones took a firm stand against petitioner. M38. Also on January 13, Eddins told petitioner to resign and made two threats: (1) if petitioner would not resign, Eddins would always discriminate against him in the assignment of courses and (2) if petitioner should ever reveal this threat, Eddins would swear that petitioner was lying. RX 68. Immediately thereafter, petitioner informed Jones that he would teach the class without any order. RX 70,at 232-233; Jones's testimony. On January 14, petitioner delivered to Jones a letter (M62), confirming this fact. But Jones wrote a letter (PX 14), advising Eddins to assign "this particular section of Eh 9 to another teacher pending further action in this matter", and the class was "re-assigned to a graduate student". 2T 609:6. Both Eddins and Jones testified that petitioner did not "refuse" to teach the class. 2T 691-693, 912:13-15, RX 70,at 201:16-18.

On February 8, 1972, Eddins, with advice of his superiors, permanently suspended petitioner from all his teaching duties, without any prior notice, charges, or opportunity for a hearing. M64, PX 7. No hearing was ever allowed on that suspension. Eddins continued making the threats of discrimination and perjury, and petitioner made a sound recording of them on February 21, 1972, transcribed as RX 68. At the first hearing, Eddins swore that he did not make such threats. Confronted with the sound recording, he admitted that it was true and accurate. RX 66 at 425-428, 456-457.

On February 28, 1972, without any prior notice, charges, or opportunity for hearing, Dean Jones ordered petitioner to resign

or "face charges". Petitioner requested charges and names of witnesses, but Jones refused to supply either. RX 81-A. Petitioner refused to resign.

On March 13 and 16, 1972, petitioner requested that President Mathews supply certain information and release a recent report of the Southern Association, which petitioner needed in connection with the article he was writing on athletics and academics. M201,202. Mathews did not respond. On March 29, 30 and April 3, petitioner discussed these matters with Trustees Williams and Caddell and gave them copies of reports of the American Council on Education and the Association of Research Libraries, and a College and University Environmental Scales survey, all ranking the University low academically. M187. On April 8, the Board of Trustees adopted a Resolution authorizing President Mathews "to handle matters of***dismissal***with regard to faculty and staff members". 2M Doc.3(H)8,p.26. On April 11, Dean Jones filed dismissal charges against petitioner. M259. The charges covered the whole period of petitioner's employment, on none of which he had received any previous complaint. A hearing was held in May and June, and Dean Jones discharged petitioner as of August 13, 1972. Petitioner appealed to President Mathews, who denied the appeal on January 24, 1973. M9.

The action of Bowling v. Mathews was filed on February 9, 1973. On May 31, petitioner amended his complaint as a matter of right (M155-159), specifically charging that certain defendants conspired to, and did, deprive him of equal protection of the laws and that certain other defendants knew of this conspiracy and failed to take any pre-

ventive action. On June 25, he filed a motion for permission to amend his complaint to charge that defendants conspired to, and did, discharge him in retaliation for his petitioning for redress of grievances and for exercise of freedom of speech for the purposes of saving taxpayers' money and improving the University academically. M172. On October 12, petitioner timely demanded trial by jury and filed a motion for permission to amend his complaint to request (1) a declaratory judgment on the issues of the constitutionality of the University's termination policy, the statement of charges, and the findings of the Hearing Committee and (2) a preliminary injunction reinstating him in his position. M308-313. Meanwhile, he had filed numerous requests and motions for discovery (M122, 125, 128, 204, 285, 288) and for preliminary reinstatement in his position. M209, 314. All of these motions were denied. M150, 203, 383, 317, 318, 325, 326, 360.

Following the procedure outlined in the majority opinion in Ferguson v. Thomas (CA5 1970), 430 F.2d 852, the Court denied petitioner's request that defendants be ordered to answer the complaint (M321), read the Committee Hearing transcript, found denial of due process, and, over petitioner's strong objections, remanded the cause to respondents for a second hearing. M382, 387; 2T 1839. Petitioner perfected Appeal No. 74-1309.

While that appeal was pending, petitioner filed motions on April 8, 1974, requesting (1) partial summary judgment, including a declaration of the unconstitutionality of the termination policy, (2) reconsideration of the order remanding the cause to the University, and (3) a preliminary injunction for back pay and full reinstatement

pending further proceedings. M419-425. The Court granted back pay and continuation of salary and denied the motions in all other respects. A10

On July 23, 1974, Dean Jones filed his Second Statement of Charges (M512-535), which, like his original charges, consisted almost wholly of charges relating to periods from one to seven years prior to the last year of petitioner's employment and to petitioner's private statements to his employer and his colleagues concerning the terms and conditions of his employment.

On January 27, 1975, petitioner filed the action of Bowling v. Scott, charging additional violations of rights protected by the First and Fourteenth Amendments and by 42 U.S.C. §§ 1983, 1985(3), and 1986 and demanding (1) a declaratory judgment on the constitutionality of the termination policy and the Second Statement of Charges and (2) an injunction reinstating petitioner in his position. S Doc. 2. The District Court's jurisdiction rested on 28 U.S.C. §§ 1331, 1343, and 2201. On January 28, 1975, he amended his complaint to add demands for damages against the individually and officially named defendants, trial by jury, and determination of the legal claims prior to determination of the equitable claims. S Doc. 4. The Court entered Orders denying all requested relief (A11-12), and petitioner perfected Appeal No. 75-1426.

On April 17, 1975, the Court of Appeals affirmed the District Court's rulings from which petitioner had appeald in Bowling v. Mathews, basing its affirmance upon Ferguson v. Thomas, supra. A6.

The second hearing did not begin until

May 1, 1975, fifteen months after it had been ordered. A4,A8. Petitioner filed motions to strike designated averments in the charges, on the grounds that they were unconstitutional because of vagueness, overbreadth, res judicata, staleness, condonation, and waiver. M536-560. These motions were denied, and petitioner moved the District Court to restrain respondents from proceeding with the second hearing until the Court could render a declaratory judgment on the constitutionality of the termination policy and the Second Statement of Charges. M509-560. The Court denied the motion. M569.

On May 22, 1975, the District Court entered a final judgment of dismissal as to defendant C. Dallas Sands (M570), and petitioner perfected Appeal No. 75-2949.

On July 21, 1975, the Hearing Committee "concurred" in the void prior discharge. 2M Doc.3(H)8, Ex.F, p.II. On October 7, 1975, Dr. Howard B. Gundy, acting for the University despite his previous disqualification of himself for bias as a defendant in the legal action (Id.Ex.U), "concurred" in the Committee's "concurrence". On April 3, 1976, the Trustees, who were also defendants for damages, "approved" the "concurrence" of the Hearing Committee. 2M Doc.3(H)8.

The District Court denied petitioner's requests for a plenary trial, including trial by jury, reviewed the Second Hearing record, and, without opinion, entered summary judgment for respondents on both the equitable and the legal issues, on the basis of the hearing record on the equitable issues. A14. Petitioner perfected Appeal No. 75-3879, and the Court of Appeals affirmed, on the basis of Ferguson v. Thomas, supra. A1.

REASONS FOR GRANTING THE WRIT

I. Unconstitutional Fifth Circuit Rule

The United States Court of Appeals for the Fifth Circuit has fashioned a rule of constitutional law which denies to teachers and all other school personnel the right to a federal forum and trial by jury, and limits the District Court to a review of the administrative record, on all civil rights claims arising under the Fourteenth Amendment and 42 U.S.C. §§ 1983, 1985, and 1986. This rule departs so far from the prescribed course of judicial procedure as to call for an exercise of this court's power of supervision.

Sections 1983, 1985, and 1986 expressly provide for a plenary trial in "an action at law" and/or "suit in equity", and 28 U.S.C. §§ 1331 and 1343 provide that "[t]he district courts shall have original [not appellate] jurisdiction of any civil action commenced by any person" under these acts and the Fourteenth Amendment. This court has "long held that an action under § 1983 is free from [the exhaustion] requirement." Ellis v. Dyson (1975), 421 U.S. 426, 432; Monroe v. Pape (1961), 365 U.S. 167; McNeese v. Board of Education (1963), 373 U.S. 668, Damico v. California (1967), 389 U.S. 416; King v. Smith (1968), 392 U.S. 309; 312; Houghton v. Shafer (1968), 392 U.S. 639; Wilwording v. Swenson (1971), 404 U.S. 249; Gibson v. Berryhill (1973), 411 U.S. 564; Steffel v. Thompson (1974), 416 U.S. 249.

This court has also consistently held that "[i]n cases in which legal relief is available and legal rights are determined, the Seventh Amendment provides a right to

jury trial." Lorillard v. Pons (1978), 98 S.Ct. 866, 871; Curtis v. Loether (1974), 415 U.S. 189; Pernell v. Southall Realty (1974), 416 U.S. 363. The Court has further held that in an action involving both legal and equitable claims, a litigant is entitled to jury determination of the legal issues and all facts common to both the legal and the equitable issues, prior to determination of the equitable issues. Beacon Theatres v. Westover (1959), 359 U.S. 469; Dairy Queen v. Wood (1962), 369 U.S. 469.

In Mitchum v. Foster (1972), 407 U.S. 225, 242, the Court emphasized: "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's rights---to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative or judicial.'" In Preiser v. Rodriguez (1973), 411 U.S. 475, 496, the Court held that "the filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure."

Despite these facts, the Fifth Circuit has fashioned, and continues to enforce, a procedure which runs directly counter to this court's rulings and the Civil Rights Acts, in two most fundamental respects. First, it requires exhaustion of state administrative remedies; second, it restricts the District Courts to a review of the administrative hearing record. It thus repeals the Civil Rights Acts and reinterposes state officials between public employees and the federal courts.

The Fifth Circuit took the first step in the formulation of this procedure in Stevenson v. Board of Education (CA5 1970), 426 F.2d 1154, "a civil rights case brought under 42 U.S.C.A. §§ 1981 and 1983 and 28 U.S.C.A. § 1343(3), by three male Negro high school students who were suspended from school for refusing to shave." Id. at 1156. Although the panel expressed awareness of this court's rulings in Monroe, Damico, Houghton, and King, supra, it held these cases inapplicable "in school personnel and management problems." Id. at 1157.

In Ferguson v. Thomas, supra, the Fifth Circuit applied its exhaustion-and-limited-review procedure to teacher discharge cases. A divided panel held that the District Court had erred in allowing a plenary trial and advised that such procedure not be permitted in similar future cases:

> Federal Court hearings in cases of this type should be limited in the first instance to the question of whether or not federal rights have been violated in the procedures followed by the academic agency in processing the plaintiff's grievance. If a procedural deficit appears, the matter should, at that point, be remanded to the institution for its compliance with minimum federal or supplementary academically created standards. ... If the procedures followed were correct and substantial evidence appears to support the Board's action, that ordinarily ends the matter. [Id. at 858; emphasis added]

In the recent case of Viverette v. Lurleen B. Wallace Jr. College (CA5 1979), 587 F.2d 191, 193, the Fifth Circuit further extended the Ferguson procedure to

apply to all civil rights actions involving "employees" of "educational institutions" and summarized the procedure as follows:

> In reviewing the decision of an educational institution to discharge one of its employees, a federal court is limited to a two-tier level of inquiry: whether the procedures followed by the school authorities comported with due process requirements, and, if so, whether the action taken is supported by substantial evidence. Ferguson v. Thomas, 430 F.2d 852, 858 (5th Cir. 1970); Fluker v. Alabama State Board of Education, 441 F.2d 201, 208 n.15 (5th Cir.1971); Thompson v. Madison County Board of Education, 476 F.2d 676, 680 (5th Cir.1973)(Clark,J., concurring); Stapp v. Avoyelles Parish School Board, 545 F.2d 527, 534 (5th Cir.1977). Because federal courts are limited in the scope of their review to the procedures employed by and the evidence before an educational review board, it was not improper for the district court to grant summary judgment on the basis of the transcript of the hearing by the Ad Hoc Committee and the exhibits attached thereto; in fact, de novo hearings in district courts on such matters are not favored. [Emphasis added]

This summary implies that the Ferguson procedure has been universally approved and adopted by all "federal courts", whereas neither this court nor any Court of Appeals other than the Fifth Circuit has ever adopted this procedure.

By limiting the District Courts to a review based on substantial evidence, the Ferguson procedure shifts the burden of

proof from the school officials to the teacher and also requires that he prove, by at least a preponderance of the evidence, that he should not have been discharged, whereas due process mandates that the burden is on the moving parties to prove, by at least a preponderance of the evidence, that the teacher should be discharged. The Ferguson procedure completely reverses and inverts the most basic principle of all law: the presumption that every person charged with an offense must be presumed innocent until proven guilty. Speiser v. Randall (1958), 357 U.S. 513, 525; Armstrong v. Manzo (1965), 380 U.S. 545, 551-552.

The Ferguson procedure stands the Civil Rights Acts on their head. Moreover, it emasculates the Fourteenth Amendment and repeals the Seventh; for it denies the right to trial by jury, including the right to jury determination of the legal issues and of all facts common to the legal and the equitable issues, prior to determination of the equitable issues.

The Fifth Circuit has twice held that petitioner must not only exhaust administrative remedies but that he must exhaust them twice. Although the Record shows that petitioner had fully exhausted administrative remedies and had been finally discharged, before filing this action (A2), the District Court denied petitioner's right to trail on this issue in a federal forum and remanded the cause to the University for a second discharge proceeding, and the Fifth Circuit twice approved this procedure. A5, A7. The first appeal panel justified its approval of the remand on the basis of its (erroneous) finding that "the second administrative hearing of which Bowling now complains was

accorded by the trial court at his own behest". A7. The Record in Bowling v. Mathews shows that petitioner at no time requested a second hearing and that he repeatedly objected to such hearing. M423; 2T1839. He filed the action of Bowling v. Scott to forestall that hearing, S Doc. 2.

This court has held: "A court's jurisdiction may be lost 'in the course of the proceedings' due to failure to complete the court---as the Sixth Amendment requires---by providing counsel for an accused who is unable to obtain counsel .... If this requirement of the Sixth Amendment is not complied with, the court no longer has jurisdiction to proceed." Johnson v. Zerbst (1938), 304 U.S. 458, 467-468.) Citing Johnson, the Fifth Circuit has held that a court loses jurisdiction if it fails to complete the court by granting properly demanded jury trial: "We believe that a judgment ... reached without due process of law is without jurisdiction and void ... because the United States is forbidden by the fundamental law to take either life, liberty or property without due process of law, and its courts are included in this prohibition. The right of jury trial, if not waived but denied after demand, the judge usurping the function of the jury, would seem to be similarly [as deprivation of counsel was in Johnson] an unconstitutional abuse of power." Bass v. Hoagland (CA5 1949), 172 F.2d 205, 209. This court denied certiorari. 338 U.S. 816.

In the instant case, the Fifth Circuit panel re-affirmed the Ferguson procedure as "the well-established authority of this Circuit" and held that it forecloses the right to jury trial: "We reject, as

inconsistent with the well-established authority of this Circuit, appellant's contention that minimum procedural due process entitles him to a jury trial on the merits of his termination. See, e.g., Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970)." A5, n.7. The panel found that the proceedings in the District Court and by the University "fully complied with the procedural due process standards of the Fourteenth Amendment." A5.

That this finding is clearly erroneous in numerous respects, in addition to denial of trial by jury, is obvious on its face. In footnote 5, that opinion quotes from Dr. Scott's memorandum to the Second Hearing Committee the instruction that "the burden of proof ... shall be satisfied only by clear and convincing evidence". Yet, on the same page, the opinion states that the Committee based its findings upon "substantial evidence". A4.

That opinion further staces that petitioner was "represented throughout these proceedings by a Professor at the University of Alabama Law School." A4. Both the hearing transcript and an affidavit of that professor reveal that some of the hearing sessions were scheduled at times that Professor Holt could not be present, 2T 761, contrary to Dr. Scott's written instruction that the Committee must schedule the times of its meetings "with due consideration for the convenience of ... Dr. Bowling and his counsel" (2M Doc.3(H) 8, Board Ex. D); that, on one occasion when Professor Holt could not be present, the Committee held a meeting, over his and petitioner's protests, heard testimony

from an unscheduled witness whom the committee had been informed that only Professor Holt was prepared to question, and denied petitioner's request for permission to make a telephone call to Professor Holt for his counsel. 2T 761, 1861-1837, 1950, 2010-2015; Professor Holt's affidavit, 2M Doc. 3(H)8, Bd. Ex.T.

The panel opinion fails to note innumerable other violations of due process in the second discharge proceedings, including the following. There was a fifteen-month delay between the date of the rehearing order of February 1, 1974, (A8) and the beginning of that hearing, May 1, 1975. A4. That delay denied due process in two important respects. First, the longer petitioner was deprived of his association with students and colleagues, the more firmly established became the view that he was a "discharged professor", thereby prejudicing potential members of the second hearing committee. Second, the delay allowed witnesses to disappear and memories to grow dim concerning the facts surrounding and preceding the suspension and discharge. Morrissey v. Brewer (1972), 408 U.S. 471. Indeed, on October 9, 1973, respondents alleged that they were unable to answer the complaintbecause "this case has been talked around" so much that respondents were unable to distinguish between what they had done and what they had heard. M469. Of the seven witnesses testifying against petitioner, six repeatedly contradicted their own testimony and exhibits and alleged unclear memories as reason for their self-contradictions and their failure to remember facts favorable to petitioner, in innumerable instances.

The Committee held an ex parte conference with University Counsel Skidmore and

accepted his advice that it employ as its counsel a relative of President Mathews. 2T 29-21, 32-33. Executive Vice President Thigpen, Academic Vice President Gundy, Assistant Academic Vice President Scott, and the Trustees refused to appear and testify before the Committee, and Thigpen told secretaries not to testify. 2T 761-762, 831, 1524-1544, 1557-1560, 1726-1728, 1836, 1838-1839. The Committee based its findings upon nine ex post facto "duties of a full professor", which it formulated and applied against petitioner after the hearings were closed. 2M Doc. 3(H)8. Bd. Ex. F, p. 1.

University Counsel Skidmore misled the Committee into misconceiving its proper function to be merely that of endorsing and concurring in the prior void discharge, rather than that of making an original, independent determination whether petitioner should be discharged. In the last sentence of his closing argument, Skidmore urged the Committee: "We respectfully ask that you render a recommendation endorsing the termination of the employment of Dr. Bowling." 2T 2275. That the Committee conceived its function in precisely this light is made clear by the final sentence of its Report: "The Committee recommends, then, since it concurs that Charge One and Charge Two have been proved by the petitioner, that respondent, Professor Lawrence E. Bowling, be dismissed from his position as a tenured professor in the Department of English, College of Arts and Sciences, The University of Alabama."

Dr. Howard Gundy, "the University official assigned the responsibility of making the final institutional decision with respect to [petitioner's] future employment"

(A5) was a defendant in the legal action for damages and had previously disqualified himself because of personal bias (Bd. Ex. U), and President Mathews had concurred in this disqualification. Bd. Ex. V. Moreover, the individual members of "the Board of Trustees of the University of Alabama, which approved the recommendation of the faculty hearing committee" (A5), were also defendants in the legal action for damages, had a vested interest in the outcome, and were not apparently impartial decision-makers. Gibson v. Berryhill, supra.

The Trustees denied due process in numerous respects, including making independent "initial" findings, contrary to their ruling that they would only "review [the Committee's] initial determination" (2M Doc.3(G)7, pp.9-10); making findings contrary to the evidence; adopting and applying against petitioner seven ex post facto "duties of a Professor of English" (2M Doc.3(H)8,p. 13) never applied against any other teacher; and denying petitioner's right to salary for "at least one academic year" after notice of termination of his employment, as provided by the termination policy. A23. The Trustees made their decision on April 3, 1976, to terminate petitioner's employment, "effective at the conclusion of the current academic year (May 16, 1976)." Id. at p. 46.

II. Conflict With Decisions Of This Court

Review is further warranted because the rulings of the District Court and the Court of Appeals conflict with decisions of this court on the following important issues:

A. First Amendment rights. The First Amendment protects the right to "freedom of speech" and the "right ... to petition the Government for redress of grievances". This court has recently held that a teacher may not be discharged for speaking privately to an employer concerning "policies and practices of the school district". Givhan v. Western Line Consolidated School District (1979), 99 S.Ct. 693. This court has long held that "[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools", Shelton v. Tucker (1960), 364 U.S. 479, 487; that "the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protection should apply with less force on college campuses than in the community at large", Healy v. James (1972), 408 U.S. 169; and that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech", Papish v. Board of Curators of the University of Missouri (1973), 410 U.S. 667, 671.

Almost the whole of the averments in the Statement of Charges (M512-535) and of the Findings of the Board of Trustees (2M Doc.3(H)8, pp.11-21) related to petitioner's private speech to his employer and to his colleagues concerning the terms of his employment and "policies and practices" of his university. See Memorandum of Official Observers of the American Association of University Professors and the American Federation of Teachers, 2M Doc.3(H)8, Bd. Ex. P. Even petitioner's alleged "refusal" to teach a section of English 9 on January 11, 1972 (M522) (which Dean Jones testified was the reason

for initiating the discharge proceedings, 2T 697:14-18; RX 70, p.247:12-15) related to the terms of his employment. Both Dean Jones and English Chairman Eddins admitted that petitioner did not "refuse" to teach the class but only "objected" that teaching it would not comply with the terms of his employment; that petitioner explicitly stated that he "was not refusing to teach the course" and that he would teach it if ordered to do so; that no order was given; that he then agreed to teach it without an order; and that it was "re-assigned to a graduate student". 2T 609, 691-693, 912, 916; PX 15; RX 70, pp. 201, 232-233.

Contrary to the foregoing testimony by Jones and Eddins, the Board found that on "January 11-12, 1972, Bowling refused ... to teach a section of English 9". 2M Doc. 3(H)8 p.14. The Board also found: "Within the academic community a Departmental Chairman's request of a member of the Department to teach a course therein is the equivalent of an order to do so" (Id. at 13), despite the fact that Jones admitted that he "didn't tell [petitioner] at the time that the request which had been made to him was tantamount to an order, equaled an order, was an order". 2T 916. The Board thus held that the word "request" has an entirely different meaning "within the academic community" than it has "in the community at large", contrary to this court's holdings in Papish, Healy, and Shelton, supra.

The termination policy (A22) provides that "the appointment of a faculty member who has tenure ... may be terminated for adequate cause." The University has never defined or restricted this term, despite

the fact that both the Association of American Colleges and the American Association of University Professors have repeatedly warned of its vagueness and overbreadth. AAUP Policy Documents and Reports, 1969 ff., p.5. See S Doc.2, p.3.

Although both lower courts impliedly held this termination policy to be constitutional, neither court analyzed that policy or cited any law supporting that conclusion. This court has consistently held unconstitutional innumerable terms far less vague and broad than "adequate cause", including "generally accepted standards of conduct" and "indecent conduct or speech", Papish, supra; "aid", "support", "counsel", "influence", Cramp v. Board of Public Instruction (1961), 368 U.S. 589, "unduly complain", "magnify grievances", "defamatory", Procunier v. Martinez (1974), 416 U.S. 396. In Procunier, the Court held: "These regulations fairly invited prison officials to apply their own personal prejudices and opinions as standards for prisoner mail censorship .... Appellants have failed to show that these broad restrictions on prisoner mail were in any way necessary to the furtherance of a governmental interest unrelated to the suppression of expression." Id. at 415. In Grayned v. City of Rockford (1972), 408 U.S. 104, 108-109, the Court held that vague regulations violate due process in three essential respects: "Vague laws may trap the innocent by not providing fair warning..... A vague law impermissibly delegates basic policy matters to [hearing committees and school boards] for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, ... a vague statute ... operates to inhibit the exercise of ... basic First

Amendment freedoms."

These observations are well illustrated in the present case. The broad and vague term "adequate cause" gave no "fair warning" of what was prohibited, "invited" both the Second Hearing Committee and the Board "to apply their own personal prejudices and opinions as standards" for determining the "duties" of a professor, and was used by respondents "to inhibit the exercise of basic First Amendment freedoms." Both the Committee and the Board applied against petitioner their separate sets of ex post facto duties never applied against any other teacher. Respondents have applied "adequate cause" to punish First Amendment expression without achieving a valid governmental interest by the "least drastic means." Shelton v. Tucker, supra.

B. Right to restoration to one's former status when deprivation has denied due process. This court has consistently held that any person deprived of a significant consitutional right without due process of law is entitled to full restoration to his original status prior to any further proceedings against him. Service v. Dulles (1957), 354 U.S. 363; Vitarelli v. Seaton (1959), 359 U.S. 535; Armstrong v. Manzo, supra. In Vitarelli, "petitioner filed suit in the United States District Court seeking a declaration that his dismissal had been illegal and ineffective and an injunction requiring his reinstatement". This court found that "petitioner's procedural rights were violated in at least three material respects in the proceedings which terminated in the final notice of his dismissal", "that such dismissal was illegal and of no effect", and "that

petitioner is entitled to the reinstatement which he seeks". Id. 537, 541, 545, 546.

In Armstrong v. Manzo, Armstrong's former wife and her successor husband brought suit to adopt the daughter of Armstrong and Mrs. Manzo, without giving notice to Armstrong. The Texas district court held a hearing and rendered a decree in favor of the Manzos. Informed of this fact, Armstrong moved the court to set aside the decree. Instead, the court held a hearing on the motion, which was denied. The Texas Court of Civil Appeals affirmed, and the Supreme Court of Texas refused an application for writ of error. On certiorari, this court unanimously reversed, holding that the granting of the original decree without notice had not only denied due process in that hearing but also shifted the burden of proof to Armstrong and prejudiced him in all subsequent stages of his case.

As a tenured senior full professor, petitioner was permanently suspended from all his teaching duties in the middle of the semester, without any notice, charges, or opportunity for hearing on the suspension. Following a dismissal hearing, to which he had objected, he was discharged. He filed action for reinstatement, back pay, and damages for the unconstitutional suspension and discharge. The District Court refused to rule on the constitutionality of the suspension, despite the fact that it had no discretion not to do so; for this court has held that "legal discretion ... does not extend to a refusal to apply well-settled principles of law to a conceded state of facts". Union Tool Co. v. Wilson (1922), 259 U.S. 107, 112. But the Court did find that the

discharge proceeding contained at least "three fatal defects", any one of which was "sufficient to sustain the lack of due process". M386. Having made this determination, the District Court had no discretion not to declare the suspension and the discharge a nullity and to reinstate petitioner in his former status. Service, Vitarelli, Armstrong, Union Tool, supra.

Instead, the Court ordered only continuation of compensation and remanded the cause to the defendants for a second discharge proceeding, over petitioner's objections. M388, 423; S Doc.2; A8, 9, 11. Thus, the Court's rulings not only allowed the suspension to continue but also gave tacit approval of that suspension, thereby shifting the burden of proof to petitioner and prejudicing him before the Second Hearing Committee and all successive bodies ruling on his case.

Procedurally, this case is almost identical with Armstrong. Respondents' suspension of petitioner without notice, charges, or hearing, was equivalent to the Texas court's rendering the original decree against Armstrong without prior notice. The Court's denial of petitioner's motions to set aside the suspension and reinstate him in his position was identical to the Texas court's denial of Armstrong's motion to set aside its original decree and restore him to his original status. And petitioner was prejudiced before the Second Hearing Committee, the Board of Trustees, the District Court, and the Court of Appeals, as Armstrong was prejudiced in his subsequent proceedings in the Texas courts. The words of this court's opinion in Armstrong are

applicable, with even greater emphasis, in the present case. See 380 U.S. at 551-552.

C. Right to federal declaratory judgment on the issue of the constitutionality of the termination policy and the second statement of charges. In Ellis v. Dyson, supra, this court held that, in a civil rights action under § 1983, "the opportunity for adjudication of constitutional rights in a federal forum, as authorized by the Declaratory Judgment Act, becomes paramount." 421 U.S. at 432.

In Bowling v. Mathews (M 311, 421), petitioner repeatedly requested declaratory judgment on the issue of the constitutionality of the termination policy (A22) under which he had been discharged. The Court refused to consider these requests. M325; A9. In Bowling v. Scott, the complaint (S Doc.2) demanded a declaratory judgement on the issue of the constitutionality of both the termination policy and the Second Statement of Charges, under which respondents were again seeking his discharge. Again, the Court refused to rule on this issue. All.

D. Right to damages for unconstitutional deprivation. This court has held that any unconstitutional deprivation of rights, privileges or immunities is actionable in the Federal courts for damages under §§ 1983, 1985, and 1986. Monroe v. Pape, supra; Wood v. Strickland (1975), 420 U.S. 308; Carey v. Piphus (1978), 98 S.Ct. 1042. In Carey, the Court held that "the denial of procedural due process should be actionable for nominal damages without proof of actual injury. Id. at 1054.

Petitioner was permanently deprived of all his teaching duties on February 8, 1972, in the middle of the semester and without any notice, charges, or opportunity for hearing on that deprivation, either before or after the deprivation. P.7 supra. Respondents have never disputed these facts. In his complaint, petitioner also charged and the District Court found (M386, A8), that respondents had discharged him without due process of law, and respondents have never challenged the Court's ruling. Despite these undisputed facts and this ruling, however, the District Court denied petitioner's right to nominal damages and his right to trial on the issues of compensatory and punitive damages and entered summary judgment for respondents on all issues (A14), and the Court of Appeals affirmed and taxed costs against petitioner. A1, 16. Even nominal damages, which the courts had no discretion to deny, would have entitled petitioner to his costs and attorney fees.

E. Right to answer, discovery, and exploration of facts before dismissal of defendants charged with conspiracy. The complaint and the amended complaint in Bowling v. Mathews (M 1-88, 155-159) charged that defendants conspired to, and did, deprive petitioner of rights protected by the Constitution and laws of the United States. As to respondent Sands, petitioner averred that Sands was a long-time personal friend of English Chairman McMillan and supported him in the 1964 political solicitation which gave rise to this action; that, on January 12, 1972, Sands advised Dean Jones in the matter of discharge proceedings in the present case; that, thereafter, Sands accepted an

appointment to serve on the First Hearing Committee, despite the fact that the AAUP guidelines adopted by that committee provided that such committee should be composed of faculty members "not previously connected with the case". M 37-38. These are fact issues, which this court has held may not be determined on a motion to dismiss. Scheur v. Rhodes (1974), 416 U.S. 232, 250.

Contrary to this ruling and to F.R.C.P. 56, the District Court dismissed a number of respondents (M 215, 375) and later entered a final judgment of dismissal as to Sands (A13), before answer, discovery, or exploration of facts.

III. Conflict With Other Circuits

Review by this court is warranted also because the Fifth Circuit's decision conflicts with decisions of other circuits.

The Sixth Circuit in Clemons v. Board of Education of Hillsboro (CA6 1956), 228 F.2d 853, 856-858, reversed a District Court's denial of injunctive relief and stated: "While the granting of an injunction is within the judicial discretion of the District Judge, extensive research has revealed no case in which it is declared that a judge has judicial discretion by denial of an injunction to continue the deprivation of basic human rights. ... Such abuse of discretion requires reversal."

The Fourth Circuit in Henry v. Greenville Airport Commission (CA4 1960), 284 F.2d 631, 633, held: "The District Court has no discretion to deny relief by preliminary injunction to a person clearly establishing by undisputed evidence that he is

being denied a constitutional right."

The Seventh Circuit in White v. Roughton (CA7 1976), 530 F.2d 750, reversed the District Court and ordered immediate reinstatement of welfare payments because the "unwritten personal standards" applied by defendants violated due process.

The Ninth Circuit in Stewart v. Pearce (CA9 1973), 484 F.2d 1031, 1033, affirmed the District Court's holding that suspension of a teacher without any hearing denied due process and that a "preliminary injunction requiring Stewart's immediate reinstatement to his teaching duties" was appropriate.

After finding denial of due process, the District Court denied petitioner's motions for "reinstatement to his teaching duties" and "continue[d] the deprivation of basic human rights" during the second discharge proceeding. A10.

IV. Conflict With Alabama Supreme Court

Review by this court is warranted also because the Fifth Circuit has decided an important question of an Alabama teacher's rights of due process in a way conflicting with the Alabama Supreme Court's ruling on the same issue.

In State Tenure Commission v. Madison County Board of Education (1968), 213 So. 2d 823, the Alabama Supreme Court held that the statement of charges was "glaringly defective and not due process" because "after these dates complained of, the teacher was an approved teacher in the school and served subsequent terms. Such alleged violations, even if proven, were condoned and waived for all periods

other than the last school year served by the teacher before the written complaint against him." Id. at 829. Compare dissenting opinion of First Hearing Committee Member Edward M. Smith. M 77.

In the present case, almost all the specifications on which both the Committee and the Board based their findings related to periods ranging from one to seven years prior to "the last school year served by the teacher before the written complaint against him". M 512-535. The Board's and the courts' approval of such charges deprives petitioner not only of due process of law but also of equal protection of the laws, as applied to Alabama teachers by Alabama's highest court.

CONCLUSION

Because the Fifth Circuit's Ferguson rule denies to a large and crucial segment of the American population those basic constitutional rights of First Amendment expression, trial by jury, and plenary trial in a federal forum on constitutional issues and because the lower court rulings denied due process in other fundamental respects, this petition should be granted and those rulings should be reviewed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Nos. 75-1426, 75-2949 and 76-3879

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

v.

CHARLEY SCOTT et al.,
Defendants-Appellees.

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

v.

DAVID MATHEWS et al.,
Defendants-Appellees.

January 8, 1979.

Before JONES, AINSWORTH and HILL, Circuit Judges.

PER CURIAM:

At the heart of this consolidated appeal[1] lies appellant's principal claim[2] that his

[1]These three numbered appeals, consolidated for consideration on appeal, arise out of two actions filed in the district court, both of which involve virtually the same defendants and, in all material respects, the same action.

[2]Although the appellant's due process attack on his termination procedure constitutes the basic thrust of his argument on appeal, we take notice of some twenty-three contentions raised by appelland in his original briefs filed on appeal, many

discharge as a tenured English Professor at the University of Alabama violated the due process guarantees of the Fourteenth Amendment. Because we hold that appellant's termination comported with both procedural and substantive due process, we affirm the various judgments and orders of the district court appealed from.

Appellant Bowling's troubles began with the filing of formal dismissal charges against him in April of 1972. Following a two-week hearing by a faculty committee on these charges in June of that year, appellant's employment was terminated, effective on August 13, 1973, in accordance with the recommendation of the committee.

On February 9, 1973, appellant filed the first of the two actions involved in this appeal, alleging that his termination was unconstitutional and asking for damages and injunctive relief in the form of reinstatement. The district court found the faculty committee hearing to have been deficient in procedural due process, and remanded the cause to the University for a rehearing

of which do not relate to his due process argument. We choose only to discuss appellant's due process argument, but we have dutifully examined his other contentions and find them to be without merit. A few of these undiscussed contentions were resolved adversely to appellant by a prior appeal in this case, Bowling v. Mathews, 511 F.2d 112 (5th Cir.1975).

[3]The second action involved in this appeal, Bowling v. Scott, No. 75-1426, filed by appellant on January 27,1975, named virtually the same defendants and contained essentially the same allegations as did the complaint in the first-filed action. Appeal is taken from various orders entered by the district judge in the second action and, as noted in fn. 2, we affirm the orders appealed from without discussion.

that afforded appellant due process. That order, among others, was affirmed by this Court in Bowling v. Mathews, 511 F.2d 112 (5th Cir. 1975).

Following remand, the university served appellant with a new Statement of Charges, consisting of twenty-four legal-sized pages, which contained dual allegations that appellant failed to perform his assigned duties and committed acts inimical to the efficient functioning of the Department of English. This document specified, in painstaking detail, the factual basis for each charge, the names of those witnesses expected to testify in support of the charges, and the nature of their expected testimony.

Appellant and his counsel next participated in a series of meetings called for the purpose of selecting a faculty hearing committee. The committee was chosen from a master list consisting exclusively of full professors with tenure, but excluding, on a categorical basis,[4] those professors with a potential bias toward appellant's cause. Each party was allowed an unlimited number of challenges for cause and two peremptory challenges.

Following the selection of the committee, Dr. Scott, the administrative official of the college designated to preside over the selection and organization of the committee,

[4]Excluded from the list were all faculty members employed in the College of Arts and Sciences; any administrator or area or department chairman; all professors on leave from the University during the spring semester of 1975; and those members of the faculty hearing committee which considered the first Statement of Charges against appellant.

issued a memorandum of instructions to the committee in which he outlined various procedural guidelines which were to be followed.[5] Subsequent to Dr. Scott's instructions, the committee adopted supplemental procedural rules to govern the conduct of the hearing; these rules were provided to all parties with an opportunity to object within five days thereafter.

Beginning on May 1, 1975, fourteen hearing sessions were held by the committee, with appellant being represented throughout these proceedings by a Professor at the University of Alabama Law School. During the course of the hearings, some twelve witnesses were examined and cross-examined; the University introduced into evidence seventy-nine exhibits and appellant introduced eighty-four exhibits.

Following the conclusion of the faculty committee hearing, the committee issued a twelve-page report finding the charges against appellant to be supported by substantial evidence and recommending that he

[5] Among the instructions contained in Dr. Scott's memorandum were those which: (1) permitted the University and plaintiff to have an academic advisor or counsel; (2) provided for a national AAUP observer; (3) provided for the stenographic reporting of the proceedings with copies of the transcript to be made available to both parties; (4) provided that "the burden of proof that adequate evidence exists in support of the separate charges contained in the statement of charges rests upon [the University] and shall be satisfied only by clear and convincing evidence introduced during the hearing before the faculty hearing committee"; (5) provided for broad latitude in the introduction of evidence but excluded "hearsay" evidence; and (6) required that the committee make explicit findings.

be dismissed from his position as a tenured professor. After considering the committee's report and appellant's memorandum in opposition thereto, Dr. Howard Gundy, the University official assigned the responsibility of making the final institutional decision with respect to appellant's future employment, accepted the recommendation of the committee and informed appellant by letter dated October 7, 1975, that his employment would be terminated, effective August 15, 1976. Appellant subsequently appealed to the Board of Trustees of the University of Alabama, which approved the recommendation of the faculty hearing committee.[6]

The district court, in granting defendants' motion for summary judgment, concluded that the above proceedings fully complied with the procedural and substantial due process standards of the Fourteenth Amendment. We agree.[7] The University officials in this case have meticulously adhered to the procedural safeguards outlined in our prior opinions; moreover, our independent review of the record before the committee convinces us that the action taken was supported by substantial evidence. See Ferguson v. Thomas, 430 F.2d 852 (5th

[6]The Board of Trustees issued a forty-six page report upholding the decision of the University officials. In reaching this conclusion, the Board carefully considered, in addition to the committee's report, the entire record before the committee, as well as the briefs submitted to the Board by appellant. Moreover, appellant was allowed to present, with the assistance of counsel, an oral argument before the Board members.

[7]We reject, as inconsistent with the well-established authority of this Circuit, appellant's contention that minimum procedural due process entitles him to a jury trial on the merits of his termination. See, e.g., Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970).

Cir. 1970); Green v. Board of Regents of Texas Tech University, 474 F.2d 594 (5th Cir. 1973); Stapp v. Avoyelles Parish School Board, 545 F.2d 527 (5th Cir. 1977); Viverette v. Lurleen B. Wallace State Junior College, 587 F.2d 191 (5th Cir. 1979).

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1309

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

v.

DAVID MATHEWS et al.,
Defendants-Appellees.

April 14, 1975.

Before BELL, THORNBERRY and GEE, Circuit Judges.

PER CURIAM:

Appellant Bowling, a tenured professor of English at the University of Alabama appearing pro se, has brought various suits grounded on his attempted discharge. on the merits, he claims in general that his termination was for attempted exercise of rights of free speech, and further, was wanting in procedural due process. Our task is complicated by Dr. Bowling's practice of attempting a separate and immediate appeal from many, if not most, of the adverse rulings of the trial court as they occur.

At present, Bowling is being paid his salary by order of the trial court during the process of remand and rehearing by the University (because of procedural deficiencies thought by the court to have obtained in the earlier hearing) pursuant to the procedures outlined in Ferguson v. Thomas, 430 F.2d 852 (5th Cir. 1970). This appeal seeks to place the merits of his situation before us, as well as a complaint of the Ferguson procedure. The merits are not properly before us, and we decline to consider them at this juncture. Further, observing that the second administrative hearing of which Bowling now complains was accorded by the trial court at his own behest, we do not find the court's decision to order the university to rehear the case in error.[1] Ferguson, supra. There will be time for the merits when they are drawn before us after this hearing, as doubtless they will be.

Appellant Bowling further complains of the dismissal of certain defendants. Many remain, however, and the court's action in dismissing some but not all defendants in this multi-party action is not appealable in the absence of an FRCP Rule 54(b) "express determination," absent here.

His complaints of the injunction, under which he has continued to receive his salary to date, reveal no abuse of discretion by the court below. He likewise appeals from the refusal of the district judge to disqualify himself. An examination of his affidavit of disqualification establishes that its asserted grounds are limited to actions of the judge in the case at bar.

[1]No questions being raised about the specific details of the court's order as opposed to the fact of it, we have no occasion to consider or decide them.

These will not suffice. United States v. Roca-Alvarez, 451 F.2d 843, 848 (5th Cir. 1971), rehearing granted, 474 F.2d 1274 (1973). His remaining complaints relate to interlocutory matters not meeting any of the tests of 28 U.S.C. § 1292.

Affirmed.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING,)
Plaintiff,
- v -) CIVIL ACTION NO.73-M-138

DAVID MATHEWS, et al.,)
Defendants

ORDER

The Court has reviewed the pleadings in this case and the transcript of the administrative hearings before a faculty review committee. The Court is of the opinion as set forth in the Memorandum Opinion filed contemporaneously herewith that plaintiff was denied procedural due process in the dismissal proceedings by the University.

Accordingly, it is ORDERED and ADJUDGED that the responsible officials at the University grant to plaintiff a hearing on the issue of his employment by the University which complies with the fundamental standards of procedural and substantive due process.

Done this 1st day of February, 1974.

/s/ Frank H. McFadden
Chief Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING,)

- v -) CIVIL ACTION NO.73-M-138

DAVID MATHEWS, et al.)

ORDER

This cause came on to be heard before a regularly scheduled motion docket upon five motions filed by the plaintiff: (1) plaintiff's motion to reconsider the Court's order dismissing the complaint against defendants Mann, Bealle, Skidmore, the Board of Trustees, Sands, Hagood, Pancake, and Johnson; (2) plaintiff's motion for preliminary injunction; (3) plaintiff's motion for partial summary judgment [including a declaratory judgment on the constitutionality of the University's termination policy]; (4) plaintiff's motion to reconsider the Court's previous order remanding the case to the University for a hearing; and (5) plaintiff's motion to expedite action on motions (1) through (4) above.

The Court has considered the motions and has heard argument of counsel and is of the opinion that the following disposition of the motions should be made:

(1) Plaintiff's motion to reconsider the previous order dismissing certain defendants is due to be denied.

(2) Plaintiff's motion for a preliminary injunction is due to be granted to the extent that the University should pay the

plaintiff back pay at the rate of $14,300 per annum from the date that his pay was terminated until the University makes a final determination of his status. All other aspects of the motion for preliminary injunction are due to be denied.

(3) Plaintiff's motion for partial summary judgment is due to be denied.

(4) Plaintiff's motion to reconsider the Court's previous order remanding the case to the University for a further hearing is due to be denied.

(5) The Court's disposition of motions (1) through (4) above render plaintiff's motion to expedite action on those motions moot.

Accordingly, it is ORDERED, ADJUDGED and DECREED as follows:

(1) Plaintiff's motion to reconsider the Court's previous order dismissing defendants Mann, Bealle, Skidmore, the Board of Trustees, Sands, Hagood, Pancake and Johnson is hereby denied.

(2) Plaintiff's motion for a preliminary injunction is granted to the extent that David Mathews, as President of the University of Alabama, is hereby directed to pay to the plaintiff his regular salary (at the rate of $14,300 per annum) from the date of the plaintiff's last payment until a final determination of his status is made by the University. Payment of the back salary shall be made by June 27, 1974. All other aspects of the plaintiff's motion for preliminary injunction are hereby denied.

(3) Plaintiff's motion for partial summary judgment is hereby denied.

(4) Plaintiff's motion to reconsider the Court's previous order remanding the case to the University for a further hearing is hereby denied.

(5) In the light of the disposition of motions (1) through (4) above, plaintiff's motion to expedite action on those motions is hereby declared moot.

Done this 20th day of June, 1974.

/s/ Frank H. McFadden
Chief Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING, Plaintiff	)
- v -	) CIVIL ACTION NO.
CHARLEY SCOTT, individually and as Assistant Academic Vice President, University of Alabama; et al., Defendants	) 75-M-0098-W

ORDER

This cause came on to be heard on plaintiff's application for a temporary restraining order. By consent of the parties, this application will be treated as a motion for a preliminary injunction. The Court has heard the oral argument of the parties and has considered the pleadings filed in the case and is of the opinion that the motion is due to be overruled.

The issue presented in this case is the constitutionality of the termination policy of the University of Alabama that covers tenured personnel. Plaintiff alleges that the policy is unconstitutional on its face

and as applied to him. The case is before the Court on plaintiff's motion for a preliminary injunction forbidding defendants from proceeding against him under the allegedly unconstitutional policy.

Plaintiff may not receive the relief he seeks with this motion at the present time. The issue here is currently before the United States Court of Appeals, Fifth Circuit, in the appeal in the case of Bowling vs. Mathews, et al., C.A. No. 73-M-138-W. Under these circumstances, the Court lacks jurisdiction to act on the plaintiff's motion.

Moreover, even if the Court has jurisdiction, plaintiff is still not entitled to the relief requested herein. The defendants are acting pursuant to the Court's order entered in the case of Bowling v. Mathews, et al., C.A. No. 73-M-138-W, and the Court will not enjoin them from obeying that order.

Accordingly, it is ORDERED, ADJUDGED and DECREED that plaintiff's application for a temporary restraining order, which has been treated as a motion for a preliminary injunction by consent of the parties, be, and the same hereby is, overruled.

Done this 28th day of January, 1975.

/s/ Frank H. McFadden
Chief Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING,)
Plaintiff)
- v -)CIVIL ACTION NO.73-M-138
)
DAVID MATHEWS et al.,)
Defendants)

ORDER

This cause came on to be heard on the motion of defendant C. Dallas Sands for entry of final judgment of dismissal as to him. The Court has examined the pleadings and is of the opinion that the motion is due to be granted. This defendant was dismissed from this action by order of the Court on February 1, 1974. The Court expressly finds that there is no just reason for delay and will direct the Clerk to enter final judgment on behalf of this defendant on the order of dismissal. Rule 54(b), Fed. R. Civ. P.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the motion be, and the same hereby is, granted. The Clerk is directed to enter a final judgment on behalf of defendant C. Dallas Sands on the order of dismissal entered on February 1, 1974.

Done this 22nd day of May, 1975.

/s/ Frank H. McFadden
Chief Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

LAWRENCE E. BOWLING,)
)
Plaintiff)
) CIVIL ACTION
- v -)
) No. 73-M-138
)
DAVID MATHEWS, et al.,)
)
Defendants)

ORDER

This cause came before the Court on plaintiff's motion for partial summary judgment and defendants' motion for summary judgment. The Court has considered the plaintiff's motion with accompanying briefs and affidavits, as well as the entire record before this Court. The Court had heretofore, on February 1, 1974, ordered that the defendants afford the plaintiff a hearing on the issue of his employment by the University which complied with the fundamental standards of procedural and substantive due process. Pending this hearing, plaintiff's compensation was reinstated. Additional proceedings were held pursuant to that order and plaintiff was dismissed by the University. The Court has carefully examined the record of these proceedings, and finds that

said proceedings were carried out in good faith and in full compliance with the procedural and substantive due process standards required by the fourteenth amendment to the United States Constitution. Since plaintiff's termination was in accordance with constitutional standards, he is entitled to no further relief under his complaint. Accordingly, it is the opinion of this Court that the plaintiff's motion for parial summary judgment should be denied and the defendants' motion for summary judgment should be granted.

Accordingly, it is ORDERED, ADJUDGED and DECREED that the plaintiff's motion for partial summary judgment be and the same hereby is denied.

It is further ORDERED, ADJUDGED and DECREED that defendants' motion for summary judgment be and the same hereby is granted and judgment is entered on behalf of the defendants.

Costs are taxed against the plaintiff.

Done this 18th day of August, 1976.

/s/ Frank H. McFadden
Chief Judge

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 74-1309

D.C. Docket No. CA 73-138

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

versus

DAVID MATHEWS, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama

Before BELL, THORNBERRY and GEE, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 14, 1975

Issued as Mandate: May 6, 1975

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 75-1426

D. C. Docket No. CA-75-M-0098-W

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

versus

CHARLEY SCOTT, individually and as Assistant Academic Vice President University of Alabama, ET Al.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before JONES, AISNWORTH and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the plaintiff-appellant pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 8, 1979

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 75-2949 & 76-3879

D. C. Docket No. 73-138

LAWRENCE E. BOWLING,
Plaintiff-Appellant,

versus

DAVID MATHEWS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before JONES, AINSWORTH and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the plaintiff-appellant pay to the defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

January 8, 1979

APPENDIX K

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
CLERK

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70120

March 13, 1979

TO ALL PARTIES LISTED BELOW:

NOS. 75-1426, 75-2949, 76-3879 - LAWRENCE E. BOWLING
v. CHARLEY SCOTT, ET AL

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Sally Hayward
Deputy Clerk

cc: Mr. Lawrence E. Bowling
Messrs. Andrew J. Thomas
J. Frederic Ingram
Mr. Jerome A. Cooper

APPENDIX L

CONSTITUTIONAL AND STATUTORY
PROVISIONS INVLOVED

U.S. Constitution, Article I, § 9:

"... No Bill of Attainder or ex post facto Law shall be passed."

U.S. Constitution, Article I, § 10:

"No State shall ... pass any Bill of Attainder, ex post facto Law ...."

U.S. Constitution, Amendment I:

"Congress shall make no law ... abridging the freedom of speech or of the press; or the right of the people ... to petition the Government for redress of grievances."

U.S. Constitution, Amendment VII:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise be re-examined in any court of the United States than according to the rules of the common law."

U.S. Constitution, Amendment XIV:

"... No State shall make or enforce any law which shall abridge the privileged or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes, § 1979, 42 U.S.C. § 1983:

"Every person who, under color of any

statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Revised Statutes, § 1980, 42 U.S.C. § 1985(3):

"If two or more persons in any State or Territory conspire ... for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more person conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President ...; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or

deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Revised Statutes, § 1981, 42 U.S.C. § 1986:

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented ...."

University of Alabama, Policy on Termination:

"The policy on University termination of appointment is as follows:

Prior to the statutory retirement age, the appointment of a faculty member who has tenure, or who is employed under an appointment working toward tenure, may be terminated for adequate cause. Except as hereinafter provided, such a faculty member whose appointment is terminated will be notified of termination at least one academic year in advance of the termination date. A faculty member appointed as temporary, part-time, visiting, or acting, and whose appointment has a definate and specified termination date, should consider such appointment as notice of the non-permanent nature of his position.

A faculty member found guilty of moral turpitude, gross incompetency, immorality, rank insubordination, or felony, when the

facts are not in dispute, may be dismissed upon short notice.

Any such charges against a faculty member will be considered by a committee chosen from the faculty, and may be presented before the governing board of the institution.

In cases where facts are in dispute, the faculty member is permitted to have with him an advisor of his choosing who may act as his counsel. A record of the hearing will be made and will be available to the parties concerned." Faculty Handbook, 1968, p. 38.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1978

NO. 78-1782

LAWRENCE E. BOWLING,
Petitioner,

V.

DAVID MATHEWS, et al.,
Respondents.

RESPONSE OF C. DALLAS SANDS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JEROME A. COOPER,
Cooper, Mitch
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Attorney for C. Dallas
Sands, Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES
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Sands, Respondent.

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STATEMENT OF ISSUES PRESENTED

As to this respondent (Sands)[1] the issues are:[2]

1. Is a distinguished teacher of law,

1 Reference herein to "respondent" is to Professor C. Dallas Sands, University of Alabama Law School.

2 There have been several appeal proceedings. A prior appeal by the petitioner is reported at 511 F.2d 112, and informs the Court of facts involved in and the nature of this prolonged proceeding.

who has long served the cause of academic freedom, subject to suit in damages because in a university faculty administrative proceeding--upon whose decision most reasonable men might differ--he voted in his capacity, as a trier, appointed without objection, to recommend dismissal of a faculty member provided one-year's severance pay be paid?

2. Did the Court of Appeals correctly affirm dismissal of a complaint in damages against a professor of law at the University of Alabama Law School,[3] who served on a faculty Hearing Committee[4] to hear charges against petitioner, a member of the faculty of another division of the University (College of Arts and Sciences); who was deliberately not challenged for cause by petitioner on advice of petitioner's counsel; who duly heard the evidence; and who concluded that petitioner represented a significant obstacle to the effective functioning of petitioner's University Department; but who recommended that it would not

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[3] This dismissal was not ordered upon mere bare bones pleading. All the facts related to respondent were before the district court in voluminous pleadings and in the extensive record of the administrative hearing.

[4] There were eventually a second committee and a second hearing in which this respondent was not involved.

be inappropriate for the University to dismiss petitioner without giving him terminal leave with pay for a period of one year?

SUPPLEMENTAL STATEMENT OF THE CASE

Petitioner seeks review of an order dismissing a complaint against respondent Professor C. Dallas Sands, a member of a five-man faculty Hearing Committee of the University of Alabama. The Committee heard charges against petitioner. Petitioner disagrees with the vote cast by respondent as a member of the Committee. Although represented by counsel and given the right to challenge members of the Committee for cause, petitioner on advice of counsel (R.39)[5] declined to exercise that option and thereby consented to respondent's sitting.

Respondent, as a member of the administrative Hearing Committee, wrote an opinion of recommendation. Petitioner himself has described that opinion as "strongly favorable to ... [petitioner], except for the penultimate paragraph" (Brief for Plaintiff-Appellant in 5th Cir., at 32-33 in Case No. 74-1309; see, also, R. 13).

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[5] "R" indicates pagination of the original record in Case No. 76-2949, CCA 5.

In petitioner's own terms, respondent is "an authority on academic freedom" (Brief, supra, at 8). Fellow faculty members who disagreed with respondent's conclusion as a member of the Committee, and whose views as "observers" of the administrative proceeding are relied upon by petitioner, have nevertheless pointedly stated that such a conclusion was one upon which "reasonable men may differ" (R. 80).[6]

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[6] Even the observers of the American Association of University Professors, who are inclined to side with petitioner in his dispute with the University (R.80) had this to say:

"As 'observers' we find ourselves in the embarrassing and unhappy position of disagreeing with our own distinguished chapter president, respected leader and colleague, Dallas Sands, who sat on the hearing board and who voted to sustain the discharge of Dr. Bowling. Had he 'dissented' we, of course, would have underscored his 'dissent' as reinforcing our own judgment in the matter of academic freedom and tenure. Now that we find ourselves on the other side of the fence in this particular case, and in the posture of appealing for most careful inquiry by the AAUP national office, we simply make note of the fact that reasonable men may disagree on such issues in specific circumstances. Professor Sands is one to whom we run when questions of academic freedom and tenure arise (and we shall continue to do so)." (emph.supp.)

The vote of the Hearing Committee, after an extensive administrative hearing in which petitioner was ably represented by counsel, was four to one to recommend dismissal (R. 73). Thereafter, petitioner was dismissed by the University. Respondent did not participate in the actual order of dismissal.

Petitioner did not sue the member of the Committee who voted in favor of petitioner and against recommendation of dismissal.

The order of the district court that required a second administrative hearing (under the procedural strictures of Ferguson v. Thomas, 430 F. 2d 852) expressly found "no personal reflection on the individual members of the Committee" (R.383).

While disagreeing with the vote rendered by this respondent as a member of the majority of the Committee, petitioner accepted the severance pay of one year which respondent had recommended.

The Court of Appeals affirmed the action of the district court in dismissing respondent.

ARGUMENT

I. Respondent Is Immune From Suit Under The Doctrine Of Quasi-Judicial Immunity

Petitioner challenged only the vote respondent cast.

His complaint simply charges respondent with having participated as a trier in an administrative hearing and having thereafter joined in a majority decision unfavorable to petitioner. It is crystal clear that the complaint seeks damages of respondent solely because of respondent's vote: the one member of the Hearing Committee who participated precisely as did this respondent in the conduct of the hearing, but who dissented without opinion in petitioner's favor, was not made a defendant.

He who sits as a trier is not subject to suit simply because of the manner in which he conscientiously votes on the issue before him.

In his capacity as a member of the Hearing Committee respondent was protected by the doctrine of quasi-judicial immunity and his dismissal was therefore correctly ordered. Cf. e.g., Lundgren v. Freeman, 307 F.2d 104 (9th Cir. 1962), citing Wilder v. Crook, 250 Ala. 424.[7]

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7 The traditional immunity of a trier of fact is the linchpin of fair hearing procedures. See Skehan v. Board of Trustees of Bloomsburg St. College, 538 F.2d 53 (3rd Cir. 1976), affirming

II. Petitioner's Right, If Any, To Object To Respondent's Sitting On The Committee Was Knowingly Waived Upon Advice Of Counsel

Respondent did nothing to invade petitioner's rights by sitting on the Committee. Were the opposite true, petitioner's position would be no better. For procedural rights embodied in due process are subject to waiver that is voluntary, knowingly and intelligently made, particularly when, as here, the relinquishment occurs with advice of competent counsel. D. H. Overmyer Co.Inc. of Ohio v. Frick Co., 405 U.S. 174, 92 S.Ct. 775.

That occurred. And, as matters proved out, petitioner's counsel's advice was sound. Petitioner was eventually the beneficiary of the generous and humane recommendation of this respondent that petitioner be discharged only if one year's severance pay were provided. Petitioner received that severance pay.[8]

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7 (cont'd) "that the common law unqualified immunity of judicial officers remains undisturbed," at 62, citing Imbler v. Pachtman, 424 U.S. 409, which recognized the time-honored immunity of those whose activities are an integral part of the judicial process.

8 Comparably, one who accepts benefits under a judgment cannot attack that judgment by appeal. 4 Am.Jur. 2d § 250.

III. The Findings Below

Denial of the petition need not reach beyond the dispositive doctrine of quasi-judicial immunity and waiver. But petitioner does not fail merely for lack of an acceptable theory for his case.

The district court, demonstrably sensitive to petitioner's procedural rights, carefully found that no impropriety can be charged to individual members of the Hearing Committee (R. 383).[9] And the Court of Appeals has affirmed.

Nothing in the present case would justify review of the concurrent findings by the two courts below. See Berenyi v. District Director, Imm. & Nat. Service, 385 U.S. 630, 635.

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9 Of course, the district court also ultimately found petitioner subject to discharge after a second administrative hearing. Respondent was by then long out of the proceeding.

CONCLUSION

This esteemed teacher and defender of academic freedom was correctly relieved by the courts below of the burden of further proceedings in this cause. Not to have done so, merely because petitioner disagreed with the result reached by respondent as a trier, would in a real sense have threatened the integrity of the very system of free and independent inquiry that is essential in such circumstances as the present.

Due process is a keystone of those values which the western world cherishes. Petitioner has enjoyed that protection to the very fullest. He has lost. And he has shown not the slightest error in the decision below.

Nor has petitioner established any conflict between that result and governing constitutional or decisional law.

Respondent submits that there is no reason to grant the petition and it should be denied.

Respectfully submitted,

Jerome A. Cooper

JEROME A. COOPER
Attorney for
Respondent C. Dallas
Sands

Cooper, Mitch &
Crawford
409 North 21st Street
Birmingham, Al. 35203

Certificate of Service

I hereby certify that copies of the foregoing Response have been served by mailing, postage prepaid, this 19 day of July, 1979, to the following:

Dr. Lawrence E. Bowling
1069 Racebrook Road
Woodbridge, Connecticut 06525

Dr. Wythe W. Holt, Jr.
Professor of Law
University of Alabama
Law School
University, Alabama 35486

J. Fredric Ingram, Esq.
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Jerome A. Cooper

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1782

LAWRENCE E. BOWLING,
Petitioner,

v.

DAVID MATHEWS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR RESPONDENTS OTHER THAN C. DALLAS SANDS IN OPPOSITION

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BRIEF FOR RESPONDENTS OTHER THAN C. DALLAS SANDS IN OPPOSITION

STATEMENT OF THE CASE

Petitioner raises a broad range of issues before this Court arising from his discharge as a tenured English professor at the University of Alabama in 1973. The narrowness and unimportance of these issues, however, is demonstrated by the Court of Appeals' notation that only one such issue — petitioner's due process argument — was of sufficient importance to merit discussion in its opinion (A 1 n. 1)*; and by the Court of Appeals' brief determination that respondent, in discharging petitioner, "fully complied" with the due process standards of the Fourteenth Amendment

*The appendix to the petition is referred to herein as "A."

and "meticulously adhered" to applicable procedural safeguards (A 5). Ironically, the degree to which respondents did in fact adhere to such due process safeguards, in terms of the great amounts of time, energy, and resources expended by the University and its officials to provide petitioner with due process in its highest form, is the only factor that makes this case atypical.

Pursuant to a written provision in its Faculty Handbook allowing dismissal of tenured faculty members for "adequate cause," formal dismissal charges were brought against petitioner in April of 1972. Following a two-week hearing by a faculty committee on these charges in June of that year, petitioner's employment was terminated effective August 13, 1973, approximately one year later.

In February of 1973, petitioner filed his first complaint (88 pages in length) alleging that his termination was unconstitutional and asking for damages and reinstatement. The District Court found the faculty hearing to have been deficient in procedural due process and remanded the cause to the University for a rehearing that afforded petitioner due process (A 8). Petitioner appealed from that order of remand which, among others, was affirmed in *Bowling v. Mathews*, 511 F.2d 112 (5th Cir. 1975), the Court of Appeals noting in support of its opinion that the second hearing was accorded by the trial court at petitioner's "own behest" (A 7).

On remand, the District Court, on petitioner's motion, ordered the University to pay to petitioner back pay at a rate equal to his regular salary from the date his pay was terminated and until final determination of his status by the University (A 10). Petitioner was not required to perform any of the duties of a professor, however, pending the rehearing. Thereafter, a new Statement of Charges, consisting of 24 legal-sized pages, was served on petitioner,

which contained allegations that petitioner failed to perform his assigned duties and committed acts inimical to the efficient functioning of the Department of English. As the Fifth Circuit summarized, that document specified "in painstaking detail" the factual basis for each charge, the names of those witnesses expected to testify in support of the charges, and the nature of their expected testimony (A 3).

Beginning in November of 1974, in a series of seven meetings participated in by petitioner and his counsel, a new faculty hearing committee was selected. The committee was chosen from a master list consisting exclusively of full professors with tenure, but excluding those professors with a potential bias toward appellant's cause. Each party was allowed an unlimited number of challenges for cause and two peremptory challenges.

Following the selection of the committee, Dr. Scott, the administrative official of the University designated to preside over the selection and organization of the hearing committee and to assist the committee, issued a detailed memorandum of instructions to the committee (*see* A 4 & n. 5). All parties were provided an opportunity to object to such rules.

Beginning on May 1, 1975, fourteen hearing sessions were held by the committee, with petitioner being ably represented throughout by counsel, Professor Wythe Holt (listed as "of counsel" to petitioner herein). Oral arguments were heard on May 29, 1975. During the course of the hearings, some 12 witnesses were examined, cross-examined, and, on occasion re-examined; the University introduced into evidence 79 exhibits and petitioner introduced 84 exhibits.

Following the conclusion of the hearing, the committee issued a 12-page report finding the charges against peti-

tioner to be supported by substantial evidence and recommending that he be dismissed from his position as a tenured professor.

After considering the committee's report and petitioner's memorandum in opposition thereto, the University accepted the recommendation of the committee and informed petitioner by letter on October 7, 1975, that his employment would be terminated, effective August 15, 1976.

Petitioner appealed to the Board of Trustees of the University which approved the recommendation of the faculty hearing committee in a 46-page report, after consideration of briefs submitted to the Board by petitioner, oral argument before the board by petitioner with counsel, and the entire transcript of the faculty committee.

Thereupon, defendants moved for summary judgment in the District Court, filing in support thereof an exhaustive array of documents consisting of several thousand pages and including the entire transcript of the faculty committee hearings with exhibits, the faculty committee report, and the Board of Trustees' report. After such filing, petitioner filed a "Motion and Brief for Partial Summary Judgment and In Opposition to Defendants' Motion for Summary Judgment." After a "careful examination" of such documents, the District Court granted defendants' motion, concluding that petitioner's termination was "in accordance with constitutional standards" and that the proceedings conducted by the University "fully complied" with the procedural and substantive due process standards required by the Fourteenth Amendment (A 14-15).

The Court of Appeals affirmed the judgment of the District Court, discussing only petitioner's due process argument and, in two footnotes, rejecting his 23 remaining arguments, including his jury trial argument (A 1, n. 1, A 5, n. 7).

ARGUMENT

Mr. Justice Rehnquist stated recently in *Barthuli v. Board of Trustees of Jefferson Elementary School District*, 98 S. Ct. 21, 22 (1977), that:

> The relevant cases of this Court dealing with the due process rights of public employees discharged from their positions are *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2513, 33 L. Ed.2d 570 (1972); *Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed.2d 15 (1974); and *Bishop v. Wood*, 426 U.S. 341, 96 S. Ct. 2074, 48 L. Ed.2d 684 (1976).

Petitioner neither cites nor discusses any one of these cases in his petition. He asserts no conflict between the decision below and any of the above decisions, no injustice in the decision below in light of such decisions, and no important question of federal law in the context of such decisions.

Petitioner's failure to discuss such cases cited by Mr. Justice Rehnquist should certainly suggest to this Court that the laboriously-constructed conflicts developed by petitioner are bottomed upon artificial inconsistencies extracted from dissimilar lines of cases. The simple truth of the matter is that *Roth*, *Sindermann*, *Arnett*, and *Bishop* make it clear that the decision below is manifestly correct, there is no conflict of decision, and certainly that no important question of federal law is presented by the petition.

I.
THE DECISION BELOW IS CLEARLY CORRECT

An independent review by this Court of the record in this case* would reveal a course of conduct by petitioner,

*Such an independent review would be permissible in such a case where constitutional rights are in issue. *Pickering v. Board of Education*, 391 U.S. 563, 578 n. 2 (1968).

over a period of approximately eight years, of insubordination and failure to perform required duties, which conduct was disruptive to the efficient functioning of the University's Department of English. Contrary to petitioner's allegations, such conduct was not limited to the early periods of his employment but instead was concentrated in the period prior to the bringing of the formal dismissal charges against petitioner in 1972.* Petitioner's acts of misconduct can be grouped into three general areas:

1. Admitted refusals by petitioner to accept duly made class assignments, on the pretext that his contract of employment required only that he teach at higher levels, or solely in the area of Renaissance or Shakespeare.

2. The creation by petitioner of friction with and hostility between himself and two successive chairmen of the Department of English. Petitioner carried on a "running" dispute with both chairmen over every conceivable facet of his employment, including complaints of violations of his contract of employment, course assignments, the amount of his salary, the organization and operation of the Department of English, his teaching loads, the scheduling of his classes, and the classrooms and offices assigned to him, when in fact there was no reasonable basis for any such complaints. Petitioner resorted to both actual and implied threats of physical harm against both chairmen, along with threats of "blackmail" against one

*Petitioner's attempt to avoid responsibility for such conduct by asserting that it occurred in the early period of his tenure at the University and was thereby condoned by failure of the University to warn him of the consequences of the same totally ignores the actual facts in the record that: (1) such conduct occurred throughout petitioner's employment; and (2) numerous discussions were held with petitioner by University officials concerning his conduct over a substantial period prior to his discharge. Formal "warnings" are simply incongruous in an academic setting at the university level.

chairman. Petitioner called one chairman a "liar and a coward" in the presence of the Dean of the College of Arts and Sciences and the University Counsel.

3. Petitioner's ongoing efforts to undermine the authority of Chairman McMillan, one of the Department Chairmen, by attacks on McMillan's personal character and professional competence. Such efforts included the disparagement of Chairman McMillan by petitioner to the other members of the English Department, University administrators and to prospective candidates for employment by the English Department; accusations that McMillan was "prejudiced" against petitioner because of his political views; and accusations that McMillan discriminated against petitioner because he was a white male.

Among the findings of the faculty hearing committee after the extensive hearing on the Statement of Charges were:

1. That petitioner failed to perform the duties incumbent upon him as a professor.

2. That petitioner conducted himself in such a manner that the efficient functioning of the Department of English was impaired.

3. That petitioner's objections to teaching courses assigned to him, his unsubstantiated interpretation of his contractual obligations, and his judgment that he was better qualified to teach certain courses than his colleagues, constituted a dereliction of the duties of a professor.

4. That petitioner exceeded his rights as a full professor by his repeated demands for special consideration.

5. That petitioner's threats of violence against Chairman McMillan exceeded the prerogatives of any professor.

6. That petitioner "seems to have been so concerned about his personal rights and privileges that he lost sight of his duties and responsibilities."

7. That petitioner was not denied academic freedom nor restricted in the expression of his views; and that his complaints and requests did not deal with important questions of academic life but rather with favors he thought he should be granted because of his rank.

8. That the disruptive conduct of petitioner did, in fact, impair the efficient functioning of the Department of English.

It was upon these acts of misconduct and findings that petitioner's discharge was based. No protected conduct, such as exercise of First Amendment rights, was made the basis of any of the Statement of Charges served on petitioner; and each of the findings made by the faculty hearing committee was based upon unprotected conduct. The hearings clearly revealed that the genesis of petitioner's acrimonious conduct was not his desire to vindicate some public right through the exercise of free speech but purely to obtain for himself preferential treatment in terms of class and course assignments, scheduling, office and classroom assignments, salaries, and other employment conditions.

Such conclusion was obvious to the faculty hearing committee, the Board of Trustees, the District Court and the Court of Appeals, and the decision below in affirming the trial court's opinion is clearly correct.

II.
THERE IS NO CONFLICT OF DECISION

The decision below does not conflict with any decision of this Court, other circuits, or the Alabama Supreme Court, contrary to the allegations of petitioner.

A. *Freedom of Speech.*

No First Amendment issue is present in this case. Often this Court has held that, although a teacher may not be discharged because of his exercise of protected free speech, *Perry v. Sindermann, supra*, the free speech rights of teachers are not absolute, and the question of whether such speech is constitutionally protected necessarily entails striking "a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Arnett v. Kennedy, supra*, quoting *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Mt. Healthy City School Dist. v. Doyle*, 429 U.S. 274, 284 (1977); *Givhan v. Western Line Consol. School*, 99 S. Ct. 693, 696 (1979). *See Board of Regents v. Roth, supra*, 408 U.S. at 582 (Douglas, J., dissenting) (" 'Whereas a man's right to speak out on this or that may be guaranteed and protected, he can have no imaginable human or constitutional right to remain a member of a university faculty.' ").

In *Mt. Healthy, supra*, this Court recently stated that a teacher may be discharged for cause even if protected free speech played a part in the employer's decision to terminate. 429 U.S. at 285. Otherwise, the Court noted, a teacher whom the employer would have dismissed even if the protected conduct had not occurred, could be placed in a "better position" as a result of constitutionally-protected conduct "than he would have occupied had he done nothing." *Id.*; *Givhan, supra* at 697.

The record in the instant case demonstrates conclusively that: (1) petitioner's discharge was based upon unprotected conduct inimical to the efficient operation of the University's English Department; (2) the University's decision to discharge petitioner was not based even in part upon any

constitutionally-protected conduct* by petitioner; and, cumulatively, (3) the decision to discharge petitioner would have been made even if petitioner had engaged in extensive protected conduct.

B. *Adequate Cause*

There is no conflict concerning the standard of "adequate cause" upon which petitioner was discharged. Such standard has often been held to be constitutionally sufficient against the same charges of overbreadth and vagueness raised by petitioner. *E.g., Arnett v. Kennedy*, 416 U.S. at 159; *Board of Regents v. Roth*, 408 U.S. at 582 ("discharges of employees for 'cause' are permissible"), *citing Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964). As stated in *Arnett v. Kennedy*, because of the "infinite variety" of factual situations in which conduct by employees may justify dismissal for cause, such standard

*Petitioner's argument that his discharge was based upon "private speech" to his employer and colleagues, which private speech is protected under *Givhan, supra*, is without merit. In *Givhan*, the private speech was made by the teacher during the implementation of a desegregation order at the employer-school, in an effort to influence school policies and practices thought by the teacher to be racially discriminatory. In holding that such private speech constituted protected conduct, this Court reemphasized its prior holding in *Pickering v. Board of Education*, 391 U.S. 563 (1968), to the effect that such speech is not protected if it adversely affects the teacher's "working relationship with the objects of his criticism" and destroys "harmony among co-workers", 99 S.Ct. at 696 & n.3, and further held that the termination decision would be permissible if it would have been made regardless of the protected speech, under the *Mt. Healthy* standard. 99 S.Ct. at 697. In the instant case, even assuming that a portion of petitioner's speech was "private", it was aimed at obtaining preferential employment conditions for petitioner, seriously affected not only the working relationships between petitioner and his colleagues but also created severe disharmony among his co-workers, and thus does not approach the type speech protected in *Givhan* or *Pickering*.

describes, "as explicitly as is required," the employee conduct which is ground for removal, and which standard the ordinary person exercising ordinary common sense can sufficiently understand and comply with. 416 U.S. at 159-61.

All of the cases cited by petitioner in this regard are factually and legally dissimilar and do not present any conflict with this Court's opinions cited above.

C. *The Fifth Circuit Rule Is Not Unconstitutional*

Petitioner's claim that the Fifth Circuit rule applied below deprived petitioner of a federal forum and trial by jury, required an exhaustion of state administrative remedies, and improperly restricted the hearing before the District Court, is without merit. None of the numerous cases cited by petitioner in such vein present any conflict with the Fifth Circuit's rule or applicable decisions of this Court.

In *Ferguson v. Thomas*, 430 F.2d 852 (5th Cir. 1970), the Fifth Circuit set out four due process requirements that should be adhered to "within the matrix of the particular circumstances present" when a teacher "who is to be terminated for cause opposes his termination":

> (a) he be advised of the cause or causes for his termination in sufficient detail to fairly enable him to show any error that may exist,
>
> (b) he be advised of the names and the nature of the testimony of witnesses against him,
>
> (c) at a reasonable time after such advice he must be accorded a meaningful opportunity to be heard in his own defense,
>
> (d) that hearing should be before a tribunal that both possesses some academic expertise and has an apparent impartiality toward the hearing.

430 F.2d at 856.

Certainly the *Ferguson* rule is consistent with applicable decisions of this Court. Even though petitioner had a "property interest" protected by the Fourteenth Amendment in his teaching position under state law as a result of the tenure provisions in his contract with the University, *Roth*, 408 U.S. 569-71, and thus was entitled to procedural due process before being discharged*, there still must be determined "what process is due" in the particular context. *Smith v. Organization of Foster Families*, 97 S.Ct. 2111-12 (1972). Ordinarily, before a person is deprived of a protected interest, he must be afforded the opportunity for "some kind of hearing," *id.* at 2112, but the "formality and procedural requisites" for the hearing "can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." *Roth*, 408 U.S. at 570 n. 7, *quoting Boddie v. Connecticut*, 401 U.S. 371 (1971).

The due process hearing to which a tenured teacher is entitled has never been suggested or required by this Court to comprise anything more than an academic hearing, precisely as afforded petitioner under *Ferguson*. *E.g.*, *Roth*, 408 U.S. at 573 (if a teacher has a right to a hearing, "due process would accord an opportunity to refute the charge before *University officials*") (emphasis added); *Sindermann*, 408 U.S. at 593 (Burger, J., concurring) (teacher who has right to re-employment under state law, also has right under Fourteenth Amendment to "some form of prior administrative or academic hearing"); *id* at 602 (if teacher has protected property interest, "college officials" are obligated to grant a hearing at his request"); *Arnett v. Kennedy*, 416 U.S. at 157 (hearing afforded by "administrative appeal procedures" even after the dismissal is a sufficient compliance with the Due process Clause). Petitioner raises

*Such conclusion was assumed by the Court of Appeals below without discussion.

no issues relating to the notice (provided by the Statement of Charges) of the causes for the discharge and the names of witnesses and nature of their testimony.

Without question, the *Ferguson* - based hearing provided petitioner in this case, replete with the right to cross-examination, arguments and briefs, exceeds the minimum due process standards set forth by this Court*, and petitioner sets forth no conflict between that hearing procedure and any decision of this Court.

The thrust of petitioner's argument appears to be that there should have been a judicial determination of the merits of his termination for "cause", in a plenary trial and by a jury. Such an argument, if accepted, would result in the possibility of an extended federal inquiry into whether "adequate cause" existed for the discharge of a public employee after each such discharge — a result clearly not intended under the First or Fourteenth Amendments. As stated in *Bishop v. Wood, supra*, where this Court recently refused to require the reinstatement of a policeman dismissed without a hearing and who claimed the *reasons* for his discharge were false:

*Compare *Arnett, supra* (discharged employee need not be afforded full panoply of rights he would have in trial-type adversary hearing); *Memphis Light, Gas and Water Division v. Craft*, 98 S.Ct. 1554, 155 (1978) (customer complaining of overcharge need be provided only an opportunity for presentation to designated employee of utility company of complaint); *Hortonville Joint School District v. Hortonville Education Association*, 426 U.S. 482 (1976). In *Hortonville*, this Court held that teachers who had been discharged by a school board for engaging in a strike which was prohibited by state law were not entitled to a hearing on the decision to discharge them by any body other than the school board, even though the school board had been active in the strike negotiations and possibly harboured some personnel bitterness toward the teachers.

> The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made by public agencies. (426 U.S. at 349).

The merits of a claim that the discharge was based upon constitutionally - protected conduct, of course, are properly before the federal court, and this Court in *Mt. Healthy* recently set forth the procedure to be followed when such a claim is presented, as follows:

> Initially . . . the burden was properly placed upon respondent [the teacher] to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" — or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board has shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct. (429 U.S. at 287).

This same *Mt. Healthy* procedure is contained in *Ferguson v. Thomas*, which could be said to have presaged the *Mt. Healthy* test:

> If the instructor challenges his termination on grounds that his constitutional rights have been infringed, a decision on that claim may and should be avoided *if valid non-discriminatory grounds are shown to have been the basis of the institution's action.* (430 F.2d at 858-59) (emphasis added).

By granting the University's motion for summary judgment under the *Ferguson* standard, the District Court was convinced that no alleged protected conduct played any part in petitioner's discharge and that "valid nondiscriminatory" or unprotected grounds had been shown to have

been the basis for petitioner's discharge, as required by *Mt. Healthy*. Rarely is a district court aided with such an extensive record as was compiled in the instant case. Among the documents before it were the 24-page Statement of Charges; the transcript of the meetings conducted to select a faculty hearing committee; the transcript of the 14 hearing sessions held by that committee containing, *inter alia*, the testimony of 12 witnesses (direct and cross examination) and a total of 163 exhibits submitted by the parties; the 12-page report of the faculty hearing committee whose recommendation that petitioner be discharged was appealed to the Board of Trustees; the transcript of the proceedings before the Board of Trustees (including the oral argument of petitioner and counsel); and the 46-page report of the Board of Trustees which reached the same conclusion reached by the faculty hearing committee. That record contains all of the allegations made by petitioner herein that his discharge was due to protected conduct and evidence profferred by petitioner in support thereof, together with all of the evidence profferred by respondents both in rebuttal of such allegations and in support of the grounds for discharge specified in "painstaking detail" in the Statement of Charges (A3). Based upon that record, which was independently reviewed by the District Court (A14) and Court of Appeals (A5), both courts clearly concluded that the University's decision to discharge petitioner was based solely upon his failure to perform assigned duties and his conduct inimical to the efficient functioning of the Department of English, and that his discharge was "in accordance with constitutional standards" and "in full compliance with the procedural and substantive due process standards" of the Fourteenth Amendment (A14-15). Such conclusion reached under the *Ferguson* standard comports fully with applicable decisions of this Court.

Petitioner's correlative claim that he was denied a federal forum and trial by jury under the *Ferguson* standard as applied herein, boils down to a claim that the District Court should not have granted summary judgment, which claim is simply unfounded in view of the extensive record before the District Court demonstrating that petitioner was discharged for "adequate cause" and not because he engaged in any constitutionally-protected activity.

Contrary to petitioner's further claim, the *Ferguson* procedure as applied herein does not require any "exhaustion" of "state administrative remedies." When the District Court determined in 1974 that the first notice and academic hearing afforded petitioner did not comport with procedural due process standards, petitioner became entitled to a sufficient due process hearing as a matter of law. *Sindermann, supra* at 602 (proof by teacher-respondent of a property interest in continued employment would not entitle him to reinstatement, but would "obligate college officials to grant a hearing at his request"); *Roth, supra*. The District Court's remand for such a hearing cannot be viewed as an exhaustion of state administrative remedies requirement. In *Roth*, this Court held that the respondent professor there had no property interest in his job under state law and therefore no due process right to a hearing prior to the decision being made not to rehire him. The district court had stayed proceedings in that case on the independent question of whether the decision not to rehire Roth was based on his free speech activities. 408 U.S. at 574-75. Mr. Justice Douglas dissented from the majority opinion on the sole ground that the allegation itself by Roth that the decision not to rehire him was based upon free speech rights required the University to afford him a hearing and reasons for its action (even though Roth had no *property* interest entitling him to a hearing under the majority opinion). Justice Douglas approved of the practice in such cases that the District Court stay the pending §1983 action until the academic notice and hearing had been completed, stating that:

> Such a procedure would *not* be contrary to the well-settled rule that §1983 actions do not require exhaustion of other remedies. (408 U.S. at 586 & n. 1a) (emphasis added).

Such a stay pending completion of the academic hearing was thought by Mr. Justice Douglas to be a permissible course for district courts to take, "though it does not relieve them of the final determination" whether nonrenewal of the teacher's contract was due to the exercise of First Amendment rights, since:

> "School-constituted review bodies are the most appropriate forums for initially determining issues of this type, both for the convenience of the parties and in order to bring academic expertise to bear in resolving the nice issues of administrative discipline, teacher competence and school policy, which so frequently must be balanced in reaching a proper d termination." (407 U.S. at 586).*

The courts of appeal agree that in such cases, where a due process hearing is required and a First Amendment claim is pending, a referral of the matter to the institution for a final (or repeated) due process hearing to insure that the matter is ripe for adjudication, presents no conflict with the exhaustion rule in §1983 actions. *Stevenson v. Board of Education*, 426 F.2d 1154, 1157 (5th Cir.), *cert. denied*,

*In a similar vein, this Court has held that the absention doctrine is applicable in §1983 actions where the question of whether a sufficient property interest exists to support a claim for a due process hearing requires resort to state courts. *Boehning v. Indiana State Employees Association*, 423 U.S. 6 (1975); *Perry v. Sindermann, supra* at 593 (Burger, C.J., concurring).

400 U.S. 957 (1970); *Raper v. Lucey*, 488 F.2d 748, 751 n.3 (1st Cir. 1973); *Fuentes v. Roher*, 519 F.2d 379, 386-89, 391 (2d Cir. 1975) (court ordered second procedural due process hearing in case where teacher, who was suspended but who continued to receive his salary pending completion of hearings, challenged the suspension on free speech grounds); *Tony v. Reagan*, 467 F.2d 953, 956 (9th Cir. 1972), *cert. denied*, 93 S.Ct. 951 (1973) (non-tenured professor who challenged on First Amendment grounds school decision not to rehire him was required to exhaust grievance procedure while district court retained jurisdiction to hear the cause on the merits after completion of the hearing).

An additional reason exists in this case to demonstrate the nonexistence of any exhaustion requirement herein. After the first faculty hearing in 1972, petitioner sought and received full and immediate access to a federal forum, in which he obtained a ruling that he had been denied procedural due process rights in connection with his discharge (A 8). The remedies he received were among the ones he sought, (1) a remand of the case to the University for a second hearing to be conducted pursuant to the *Ferguson* standard; and (2) back pay relief equal to his salary upon termination together with an injunction requiring that he be paid his salary until final disposition of the case by the University (A 9-10), a remedy equivalent to reinstatement without the obligation on the part of petitioner to perform any duties pending the rehearing.

No "exhaustion" requirement is present, therefore, because the "state administrative remedy," in this case being the second faculty hearing, constitutes one of the very *remedies awarded* by the District Court which was sought by petitioner and to which he was entitled under *Roth*. The additional remedies afforded him, back pay and a continuation of his salary, further demonstrate that no exhaustion requirement was imposed by the District Court.

Petitioner's further attack on *Ferguson*, that the district court's role in such a discharge case is improperly "limited" to whether or not the procedure followed by the defendants comported with due process requirements, fails to comprehend the distinction between (1) the procedural due process hearing, and (2) the question whether the discharge was based upon protected conduct. The limited review requirement applies only in cases where the discharged employee claims only a denial of procedural due process in connection with his discharge. In such cases, the limited review requirement is necessary to avoid prolonged federal trials over whether sufficient cause existed for an employee's discharge. *Bishop v. Wood, supra*; *cf., Board of Curators v. Horowitz*, 98 S.Ct. 948, 956 (1978) ("Courts are particularly ill-equipped to evaluate academic performance."). If the employee claims that his discharge was due to protected conduct, the *Ferguson* decision, as quoted above, clearly requires the District Court to ascertain whether the discharge was in fact due to valid, unprotected conduct. 430 F.2d at 858-59; *accord, Mt. Healthy, supra*. Nothing in *Ferguson* diminishes the right of any discharged employee to prove he was discharged for conduct protected by Constitutional guarantees.* The District Court in this action had before it all of the evidence presented to the faculty hearing committee, the findings of that committee and the report of the Board of Trustees with which to determine the constitutional validity of the grounds for petition-

**Viverette v. Lurleen B. Wallace Jr. College*, 587 F.2d 191 (5th Cir. 1979), the case petitioner relies upon as depicting the *Ferguson* procedure, is distinguished by the fact that no claim was made therein by Viverette that he had been discharged due to protected conduct. His sole claim was that he had been discharged without adequate cause and was thereby denied due process rights.

er's discharge. That evidence is clear that none of the grounds upon which petitioner's discharge was premised were constitutionally impermissible.

D. *There Is No Conflict With the Alabama Supreme Court*

Petitioner's argument that the decision below conflicts with *State Tenure Commission v. Madison County Board of Education*, 282 Ala. 658, 213 So. 2d 823 (1968) is misplaced. *Madison County* is distinguishable by the existence of a state statutory procedure in that case governing the discharge of tenured teachers, which specified the permissible grounds for discharge and provided for an administrative appeal procedure through a State Tenure Commission followed by a review by petition of mandamus filed in the circuit court. State statutes affording more due process-type protections to teachers than otherwise available under federal standards are certainly permissible under *Roth, supra*, but the factual findings made in a case like *Madison County* are clearly not germane to the instant case in which no such statutes are applicable.*

E. *There Is No Conflict Between The Circuits*

Petitioner cites no cases which disclose any conflict between the decision below and any of the other courts of appeal. All of the cases cited by petitioner in such vein are predicated on different facts and set forth no principle of decision in conflict with the decision below.

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*Had *Madison County* been decided under federal standards, the circuit court's finding there, that certain of the grounds for the discharge were proved (and thus presumably that the teacher would have been discharged but for lack of proof of other grounds), would have probably been sufficient under *Mt. Healthy, supra.*

III.
NO QUESTION OF IMPORTANCE IS PRESENTED

This is a case where, based upon independent reviews of an exhaustive record of several thousand pages, two administrative bodies and two federal courts are unanimous in their opinions that petitioner was discharged for sufficient cause based solely upon unprotected conduct. Petitioner insists that somewhere in such opinions lurks an important question of federal law which this Court should settle. Strangely, there is no citation to any pending litigation and no indication of any conflict between relevant opinions of this Court or other courts, but only the omission of any reference to the seminal cases of this Court most relevant to the instant matter. Had *Roth, Sindermann, Arnett, Bishop* and *Mt. Healthy* not been decided by this Court, there doubtless would be questions of importance to be decided herein. But in those cases this Court has laid to rest all of the questions pertinent to the instant matter and absolutely no conflict between those cases and the decision below is disclosed by the petition.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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July 24, 1979

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1732

LAWRENCE E. BOWLING,
Petitioner,

v.

DAVID MATHEWS ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.78-1782

LAWRENCE E. BOWLING,
Petitioner,
v.

DAVID MATHEWS et al.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

In their brief in opposition, respondents other than C. Dallas Sands argue that this case is controlled by Board of Regents v. Roth (1972), 408 U.S. 564; Perry v. Sindermann (1972), 408 U.S. 593; Arnett v. Kennedy (1974), 416 U.S. 134; Bishop v. Wood (1976), 426 U.S. 341; and Mt. Healthy v. Doyle (1977), 429 U.S. 274.

But each of those cases is distinguished from the instant case in one most important respect: None of the nonretained employees in those cases based any claim upon § 1983, § 1985, or § 1986 of the Civil Rights Acts. Federal employee Kennedy charged denial of

due process under the Fifth Amendment; and the four state employees charged denial of due process under the Fourteenth Amendment. None of the state employees was conceded to have had tenure. Roth and Doyle admittedly had no tenure; Bishop was found by the Court to have had no property interest protected by the Fourteenth Amendment; and Sindermann had yet to show that he had such an interest.

In the instant case, respondents admit (p.12) that petitioner had tenure. Moreover, petitioner's Complaint and his Amendment to Complaint charged respondents with depriving him of rights protected not only by the Fourteenth Amendment but also by §§ 1983, 1985, and 1986 of the Civil Rights Acts (M2, M155; Pet.3-8), which significantly enlarge the Due Process Clause of the Fourteenth Amendment.

Despite their differences from the present case, each of the referenced cases affirms one or more basic legal principles with which the decision below is in conflict.

RIGHT TO FEDERAL FORUM AND JURY TRIAL

Respondents argue that petitioner is not entitled to "a plenary trial and by a jury" in a federal forum (p.13). Such argument conflicts with the express intent of Congress in its enactment of the Civil Rights Acts and 28 U.S.C. § 1343. It also conflicts with the decisions of the Court, which has consistently held that "the filing of a complaint pursuant to § 1983 in federal court initiates an original plenary civil action, governed by the full panoply of the Federal Rules of Civil Procedure." Preiser v. Rodriguez (1973), 411 U.S. 457,496.

In the past five years, the Court has twice reversed the Fifth Circuit on the issue of a plaintiff's right to a federal forum in an action filed under § 1983. Ellis v. Dyson (1975), 421 U.S. 426; Steffel v. Thompson (1974), 415 U.S. 452.

Even apart from his claims under §§ 1983, 1985, and 1986, petitioner was entitled to trial in a federal forum and by a jury, under the Due Process Clause of the Fourteenth Amendment. In support of their argument to the contrary, respondents cite Hortonville Joint School District v. Hortonville Education Association (1976), 426 U.S. 482. But their reliance on that case is misplaced. In Hortonville, the Court held that "the Due Process Clause of the Fourteenth Amendment did not guarantee [the striking teachers] that the decision to terminate their employment would be made or reviewed by a body other than the School Board." Id. 497. However, the Court reached this conclusion only because of the following findings: (1) "that state law prohibited the strike and that termination of the striking teachers' employment was within the Board's statutory authority" (Id. 488); (2) "that the Board members had [no] kind of personal or financial stake in the decision that might create a conflict of interest" (Id. 491-492); and (3) that, "[s]ince the teachers admitted that they were in a work stoppage, there was no possibility of an erroneous factual determination on this critical threshold issue" (Id. 494).

Hortonville is thus clearly distinguished from the instant case, in which the final decision to discharge was made by school board members (1) who made independent findings of disputed facts, (2) who decided whether those findings justified discharge,

(3) who formulated and applied a set of ex post facto standards on which they based their decision to discharge, and (4) who had a "financial stake in the decision" sufficient to "create a conflict of interest" because they were defendants in the legal action in the same case. Gibson v. Berryhill (1973), 411 U.S. 564, 579. The Board members refused to testify before the Committee because they were defendants; and Dr. Gundy, who made the final administrative decision to discharge, had previously disqualified himself for the same reason. Pet. 20-21; 2T 1277:8-18, 1541:16-20.

IMPROPRIETY OF SUMMARY JUDGMENT

Respondents argue (pp.5-8) that the District Court properly granted, and the Court of Appeals properly affirmed, summary judgment for respondents, on the basis of the Second Hearing record. But they cite no law supporting this argument. Instead, they simply urge the Court to accept their version of the facts, contrary to F.R.C.P. 56(c) and consistent rulings of the Court. In Bishop, Arnett, and Sindermann, the Court reaffirmed the principle that, on a motion for summary judgment, the standard to be applied by both the trial court and the reviewing court is that the party who defended against the motion will have the advantage of the court's reading the record in the light most favorable to him, will have his allegations taken as true, and will receive the benefit of the doubt when his assertions conflict with those of the movant. Bishop, 426 U.S. at 347; Arnett, 416 U.S. at 139-140; Sindermann, 408 U.S. at 599; Wright and Miller, Federal Practice and Procedure § 2716, pp. 430-432, and cases therein cited.

In Sindermann, the Court held that the District Court improperly granted summary judgment for the school officials when there were genuine disputes as to material facts. Professor Sindermann charged that his employment was terminated without a hearing and because of his criticism of school officials. He alleged de facto tenure and the right to a hearing. Members of the Board and the President denied that their decision was made in retaliation for Professor Sindermann's criticism and argued that they had no obligation to provide a hearing. Without allowing trial on these disputed issues, the District Court accepted defendants' version of the facts and granted their motion for summary judgment. The Court of Appeals reversed and remanded for trial on these disputed issues. This court held that Sindermann was entitled to trial on the merits of both his allegation of tenure and his charge of retaliation for exercise of protected speech.

In the instant case, the District Court granted summary judgment on the basis of a school hearing record containing innumerable genuine disputes as to material facts, and respondents now argue that their version of the facts should be taken as true. The most serious of their allegations is that there were "[a]dmitted refusals by petitioner to accept duly made class assignments" (p.6). But they cite no specific instance and no page reference supporting this allegation; and the record contains no admission by petitioner that he ever refused to accept any duly made teaching assignment.

The crucial instance of "refusal" alleged in the Statement of Charges related to January 11, 1972. Dean Jones, who filed those

charges testified that petitioner's alleged "refusal" to teach a section of English 9 on January 11, 1972, was the decisive element in his decision to file the dismissal charges. 2T 967:14-18. On closer examination, however, Dean Jones admitted that petitioner did not refuse to teach the class but only objected and stated the grounds for his objection:

> A [by Dean Jones]. Dr. Bowling said if I told him to teach the course, he would teach it; he was not refusing to teach the course. ... I would not order him specifically to teach English Nine. ... Dr. Bowling told me ... that he had not taught the course, he was not prepared to teach it, did not want to teach it. [1T 201:16--202:4; RX 70; emphasis added]

> A [by Dean Jones]. He did state, "If you order me to teach the course I will do the best that I can with it." ... He then brought up the matter of the contract violations, that he was not brought here to teach lower level courses. [2T 912:13-15]

> Q. But to repeat, you didn't tell him at that time that the request which had been made to him was tantamount to an order, equaled an order, was an order, you did not use those words, or words to that effect?
> A [by Dean Jones]. I don't recall doing that. [2T 916:16-21; emphasis added]

This testimony by respondents' own witness, who also brought the charges, makes clear that petitioner did not "refuse" to teach the course, that he did not disobey any order, and that all he did was to object to a "request" and to state both his reasons

for objecting and his willingness to teach the course if "told" to do so.

DEPRIVATION OF FIRST AMENDMENT RIGHTS

In the first sentence of their argument relative to "freedom of speech" (p.9), respondents assert: "No First Amendment issue is present in this case." That a First Amendment issue is not only present in this case but is actually the crucial issue in the case is confirmed by the foregoing quoted testimony by Dean Jones, who brought the dismissal charges and who further testified as follows:

> Q. If Dr. Bowling had agreed to teach English 9 on January 11, 1972 when originally assigned would these charges have been brought?
> A [by Dean Jones]. No. [2T967:14-18]

This testimony by Dean Jones, along with that quoted on p. 6, clearly reveals that the discharge proceedings were brought against petitioner because of his exercise of two First Amendment rights: his right to freedom of speech and his right to petition his government for redress of grievances. This court has never held that an employee may be discharged for discussing with his employer the terms and conditions of his employment. Only this term, the Court reaffirmed its consistent holdings that such speech is protected by the First Amendment. Givhan v. Western Line Consolidated School District (1979), 99 S.Ct. 693. Without such protection, there could be no labor unions or labor arbitration.

UNCONSTITUTIONALITY OF "ADEQUATE CAUSE"

Respondents argue that undefined and unrestricted "adequate cause" is not unconstitutionally vague or overbroad as a standard for discharge (p.10), and they cite Arnett. But Arnett refutes their argument.

In Arnett, the alleged regulation was 5 U.S.C. § 7501(a), which provided: "An individual in the competetive service may be removed or suspended without pay only for such cause as will promote the efficiency of the service." 416 U.S. at 140. A three-judge District Court held this regulation unconstitutionally vague and overbroad. On appeal to this court, a plurality of three justices held the regulation not unconstitutional, because of the following considerations: (1) "Congress sought to lay down an admittedly general standard ... in order to give myriad different federal employees performing widely disparate tasks a common standard of job protection" (Id. at 159); (2) "'such cause as will promote the efficiency of the service' was not written on a clean slate in 1912, and it does not appear upon a clean slate now" (Id. at 160); (3) "Moreover, OEO has provided by regulation that its Office of General Counsel is available to counsel employees who seek advice on the interpretation of the Act and its regulations" (Id. at 160); (4) Congress "obviously did not intend to authorize discharge under the Act's removal standard for speech which is constitutionally protected" (Id. at 162); (5) "the Court has a duty to construe a federal statute to avoid a constitutional question where such a construction is reasonably possible" (Id. at 162); and (6)"We hold that the language 'such cause as will promote the efficiency of the service' in

the Act excludes protected speech and that the statute is therefore not overbroad." Id. at 162.

Two justices concurred with the plurality on the issues of vagueness and overbreadth, without stating why; and one justice concurred, on the ground that "[t]he regulations of the Civil Service Commission and the Office of Economic Opportunity [OEO], at which appellee was employed, give content to 'cause' by specifying grounds for removal". Id. at 172; emphasis added.

No justice expressed the view that "such cause as will promote the efficiency of the service", apart from the foregoing qualifications and restrictions, could be constitutionally valid. Indeed, even with these qualifications and restrictions, the regulation was unacceptable to three justices, who expressed the view that they "would affirm the judgment of the District Court ... in its decision that 5 U.S.C. § 7501 is unonstitutionally vague and overbroad as a regulation of employee's speech." Id.at 206.

No limiting or clarifying factor stated by any of the justices upholding the constitutionality of the statute is present in the instant case: (1) the University of Alabama's regulation that "the appointment of a faculty member who has tenure ... may be terminated for adequate cause" may not be justified on the ground that it applies to a "myriad of [state] employees performing widely disparate tasks"; for, in fact, it applies to only a few hundred employees, all of whom are teachers, performing basically similar tasks and possessing basically similar rights; (2) the phrase "adequate cause" was adopted from the American Association of University Professors' "Academic

Freedom and Tenure, 1940 Statement of Principles"; and that professional organization has long ago and repeatedly put the University on notice that "adequate cause", without clarification and restriction, is vague and overbroad:

> One persistent source of difficulty is the definition of adequate cause for the dismissal of a faculty member. Despite the 1940 Statement of Principles on Academic Freedom and Tenure and subsequent attempts to build upon it, considerable ambiguity and misunderstanding persist throughout higher education, especially in the respective conceptions of governing boards, administrative officers, and faculties concerning this matter. The present statement assumes that individual institutions will have formulated their own definitions of adequate cause for dismissal, bearing in mind the 1940 Statement and standards which have developed in the experience of academic institutions.

"Statement on Procedural Standards in Faculty Dismissal Proceedings", originally adopted in 1958 by the Association of American Colleges and the American Association of University Professors and frequently reprinted, including the AAUP Bulletin, Vol.54, No.4, Winter, 1968, pp. 439-441; AAUP Policy Documents and Reports, 1969, 1970, 1971, 1972, 1973 et seq., p.5; (3) as used by the University of Alabama, "adequate cause" appears on a "clean slate", for the University has never defined or restricted the term, as the AAUP advised; and it has never provided any counseling service comparable to that provided by OEO's Office of General Counsel, for informing teachers of the official interpretation of this regulation; (4) the University has not only failed to show that

"adequate cause" excludes protected speech but, in the instant case, has actually construed the phrase to include a teacher's discussions with his employer concerning the terms and conditions of his employment; (5) a federal court has no jurisdiction to construe a state statute or regulation (as it does a federal statute) to avoid a constitutional challenge (Arnett, supra, at 162; Note, Vagueness Doctrine in the Federal Courts: A Focus on the Military, Prison, and Campus Contexts, 26 Stanford Law Rev. 855, 871-872; (7) therefore, "adequate cause" must be declared unconstitutional on its face. Id. at 860-863.

RIGHT TO REINSTATEMENT IN 1974

Respondents concede that "petitioner had a 'property interest' protected by the Fourteenth Amendment in his teaching position under state law as a result of the tenure provisions in his contract with the University, Roth, 408 U.S. 569-71, and thus was entitled to procedural due process before being discharged" (p.12). They also acknowledge that "the District Court determined in 1974 that the first notice and academic hearing afforded petitioner did not comport with procedural due process standards"(p.16). But they argue that the deprivation of his position without due process did not entitle petitioner to reinstatement, even temporarily, but would only "oblidge college officials to grant a [second] hearing at his request." Sindermann, supra, at 603. But these cases clearly refute their argument.

In Roth, the Court reaffirmed its prior holdings that, "[b]efore a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing" complying with due process and that "[w]hen a

State would directly impinge upon interests in free speech or free press, this Court has on occasion held that opportunity for a fair adversary hearing must precede the action, whether or not the speech or press interest is clearly protected under substantive First Amendment standards." Roth, 480 U.S. at 570, n.7, and 575, n.14. In the instant case, petitioner was first removed from the classroom, in the middle of the semester and without any notice, charges, or hearing. He was later discharged following a hearing which the District Court found to have denied due process, and respondents have never challenged this finding. Petitioner's removal from his classroom forum without due process constituted an even more grave prior restraint than the seizure of allegedly obscene books in the cases referenced in Roth. Moreover, if a person must be afforded due process of law before he may be deprived of a constitutional right, it is obvious that a court may not continue to deprive a person of a constitutional right after determining that the original deprivation was unconstitutional. The Court has held that "legal discretion ... does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." Union Tool Co. v. Wilson (1922), 259 U.S. 197, 112. Once the District Court determined that petitioner had been removed from his position and his classroom forum without due process, it had no discretion to deny his full and immediate reinstatement.

In Sindermann, a professor alleging tenure was discharged without a hearing, and the trial court granted summary judgment against him. The Court held that Professor Sindermann "must be given an opportunity to prove the legitimacy of his claim. ... Proof of such a property interest would

not, of course, entitle him to [permanent] reinstatement. But such proof would obligate college officials to grant a hearing at his request, where he could be informed of the grounds for his nonretention and challenge their sufficiency." 408 U.S. at 603. The Court did not order Sindermann's preliminary reinstatement pending the referenced hearing, for he had yet to show that he had a protected property interest. But the Court did imply that, if Sindermann could show (1) that he had tenure and (2) that he had been deprived of his position without due process, he would then be entitled to reinstatement: he would not be required to await a possible second hearing, to see whether the school officials could discharge him legally.

In the instant case, at the time the District Court remanded this cause to the University for a second discharge hearing, petitioner had already proved everything that this court held that Sindermann had yet to prove in order to obtain reinstatement: First, the fact of petitioner's tenure had never been disputed; second, the Court had already found that petitioner had been deprived of his tenured position without due process. Therefore, at that point, petitioner was entitled to full and immediate reinstatement; and the District Court had no discretion either (a) to continue the unconstitutional deprivation or (b) to order another hearing. The District Court was constitutionally bound to order the full and immediate restoration of petitioner to all the rights he had enjoyed prior to the unconstitutional deprivation and to leave to repondents the decision whether to begin again with a completely new proceeding. This is the ruling mandated by this court's holdings in Vitarelli v. Seaton (1950), 359 U.S. 535, and Armstrong v. Manzo (1965), 380 U.S. 545.

CONFLICT WITH THE ALABAMA SUPREME COURT

Respondents argue that there is no conflict between the decision below and the ruling of the Alabama Supreme Court on the issue of due process in State Tenure Commission v. Madison County Board of Education, 282 Ala. 658, 213 So.2d 823 (1968). "Madison County," they argue, "is distinguishable by the existence of a state statutory procedure in that case governing the discharge of tenured teachers ..."(p.20).

Contrary to respondents' argument, the Alabama Supreme Court did not rely on any Alabama statute for its ruling that certain specifications against the teacher were "glaringly defective and not due proces" because "after these dates complained of, the teacher was an approved teacher in the school and served subsequent terms. Such alleged violations, even if proven, were condoned and waived for all periods other than the last school year served by the teacher." 213 So.2d at 829.

That the authority relied on for this ruling was the United States Constitution and not merely a state statute applicable only to Alabama "boards" and "courts" is made clear by the following facts. First, the Court stated its view of "due process" as a universal principle: "Due process must be observed by all boards, as well as courts. Due process, in more ordinary language, is held to mean 'fair play,' as stated by the court in State ex rel. Steele v. Board of Education of Fairfield, 252 Ala. 254, 40 So.2d 689." Id. at 834. Second, the reference to Steele is to the following holding: "While no particular form of procedure is prescribed for such hearings, due process must be observed. Such is the rule generally

as to hearings provided for by statute before administrative agencies. Morgan v. United States, 304 U.S 1 ...; Interstate Commerce Commission v. Louisville & Nashville R.R.Co., 227 U.S. 88 ...." It is thus clear that the Alabama Supreme Court was relying on the U. S. Constitution and not on any Alabama law when it declared that all charges relating to "periods other than the last school year served by the teacher before the written complaint against him" are "glaringly defective and not due process." 213 So.2d at 829.

In the instant case, almost all of the specifications on which both the Committee and the Board based their findings pertained to periods ranging from one to seven years prior to the "last school year served by [petitioner] before the written complaint against him"; and this was not due process.

DISMISSAL AS TO C. DALLAS SANDS

In his brief in opposition, respondent C. Dallas Sands makes three basic errors. First, he ignores the charge of conspiracy and the facts pertaining thereto. Second, he ignores the Court's construction of F.R.C.P. 12(b)(6). Third, he insists that his version of the facts should be taken as true on his motion to dismiss.

The Complaint and the Amended Complaint charged that Sands and other respondents conspired to, and did, deprive petitioner of rights protected by the Constitution. Specifically, petitioner alleged that Sands was a long-time personal friend of English Chairman James B. McMillan, whose political solicitation of petitioner during the Presidential campaign of 1964 created an unhealthful atmosphere ultimately resulting in the discharge of petitioner; that Sands supported McMillan in that solicitation; that, on January 12, 1972, Sands advised Dean Jones in the matter of bringing dismissal charges against petitioner; that, on the following day, Jones took a firm stand against petitioner; that Sands later accepted appointment by other respondents to serve on the First Hearing Committee, despite the fact that the AAUP guidelines adopted by the Committee expressly provided that such commitee should be composed of faculty members "not previously connected with the case"; that all of the specifications in the Statement of Charges before the Committee consisted of allegations by Sands's friend McMillan; that petitioner attempted to exercise his right to "two challenges without stated cause", as provided by the referenced AAUP guidelines; and that Sands and other members of the Committee denied this right. Pp. 38,39,155, 158 in Record in Appeal No 75-2949, CA5.

By assisting McMillan with the political solicitation and by advising Dean Jones in the matter of bringing discharge proceedings against petitioner, Sands had disqualified himself as an impartial decisionmaker. AAUP Policy Documents and Reports, supra, p.6; Morrissey v. Brewer (1972), 408 U.S. 471, 486; Withrow v. Larkin (1975), 421 U.S. 35, 58. By accepting appointment to serve on the Committee, Sands knowingly deprived petitioner of the opportunity of procuring an impartial decisionmaker on the Committee. If petitioner had not been thus deprived of his constitutional right to an impartial First Hearing Committee, he might have been able to defend his position successfully in that hearing and have avoided all of his subsequent injuries. It is therefore clearly

erroneous for Sands to assert, as he does, that "the complaint seeks damages from respondent solely because of respondent's vote" (p.6; emphasis added).

For the purposes of a motion to dismiss under F.R.C.P. 12(b)(6), "the complaint is construed in the light most favorable to plaintiff and its allegations are taken as true." Wright and Miller, Federal Practice & Procedure § 1357, p. 594, citing Jenkins v. McKeithen (1969), 395 U.S. 411, 421-422; Gardner v. Toilet Goods Assoc. (1967), 387 U.S. 167; Walker Process Equip., Inc. v. Food Mach. & Chem. Corp. (1965), 382 U.S. 172; Radovich v. National Football League (1957), 352 U.S. 445.

Contrary to the referenced holdings, Sands argues that the Court should accept his version of the facts. His assertion that "[a]ll the facts related to responded were before the district court" is obviously erroneous, for there was neither trial, nor answer, nor discovery. Petitioner was not "the beneficiary of [any] recommendation by this respondent" that petitioner receive "one year's severance pay" (p.7). This recommendation, which was made by the Committee and not by Sands, was completely superfluous, for the University's termination policy required such payment: "a faculty member whose appointment is terminated ["for adequate cause"] will be notified of termination at least one academic year in advance of the termination date." See termination policy in Pet. App. at A22. Sands's assertion that the District Court "carefully found that no impropriety can be charged to individual members of the Hearing Committee" (p.8) is proof only of the error of the District Court, which had no discretion to make findings of fact on a motion to dismiss.

CONCLUSION

For the reasons stated here and in the petition, the writ should be granted.

Petitioner respectfully suggests that the issue of the constitutionality of the University's policy on termination of appointment (Pet.App.22) has been fully briefed in the petition, the briefs in opposition, and this reply; that this policy's provision that the appointment of a tenured faculty member may be terminated for undefined and unrestricted "adequate cause" is clearly unconstitutional; that such decision by the Court will foreclose all the other issues except the issue of dismissal as to one defendant; and that this issue also has been fully briefed.

Respectfully submitted,

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Since this brief was printed, petitioner has learned that another University of Alabama discharge case is now pending in the U.S. Court of Appeals for the Fifth Circuit, challenging the constitutionality of the University's policy on termination of appointment. Bert D. Garrett v. David Mathews et al. (CA5 1979), No.79-2597. This is further reason for granting certiorari to decide this issue.

August 17, 1979. Lawrence E. Bowling